Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1997

ROBERT P. DeLUCA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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171 pp

QUESTION PRESENTED

Whether the partial closure of the courtroom during petitioner's criminal trial violated his constitutional rights to a public trial.

LIST OF PARTIES

Apart from the petitioner, Robert P. DeLuca, Sr., the other party to the appeal before the United States Court of Appeals for the First Circuit, whose judgment is sought to be reviewed, was Gerard T. Ouimette.

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Robert P. DeLuca, Sr. respectfully requests that a Writ Of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on February 27,1998, as well as the Order of the Court of Appeals for the First Circuit denying his Petition For A Rehearing With Suggestion For Rehearing In Banc, entered on April 14, 1998.

The opinion of the United States Court of Appeals for the First Circuit, United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998), Docket Number 96-1173 (February 27, 1998), is included in the Appendix at pp. A-1 - A-39. The Order of the Court of Appeals denying a Petition For A Rehearing With Suggestion For Rehearing In Banc appears in the Appendix at pp. A-43 - A-45.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit, affirming petitioner's conviction, was entered on February 27, 1998. On April 14, 1998, the Court of Appeals denied a Petition For Rehearing With Suggestion for Rehearing In Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . "

The First Amendment to the United States Constitution provides:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble . . . ."

STATEMENT OF THE CASE

Petitioner, Robert P. DeLuca, Sr. and his codefendant Gerard T. Ouimette, were tried before the United States District Court for the District of Rhode Island, for the crimes of using extortionate means to collect extensions of credit in violation of 18 U.S.C. § 894 and with conspiracy to violate § 894.

On October 13, 1995, the petitioner's trial commenced before the Hon. Ernest C. Torres. On the first day of the trial, without prior notice or opportunity for defense counsel to be heard, the United States Marshal's Service set up a desk outside the courtroom door, which at all times was manned by at least one deputy marshal. Any and all members of the public who sought admittance to the courtroom were told that to gain entry they had to provide picture identification containing their name, address and date of birth. As a further pre-condition of this admission procedure, the Marshal's Service prepared and maintained a list of all people who attended the trial.[1] This list was utilized, inter alia, for the stated purpose of gathering "intelligence." (Apdx. B-110)

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[1]See May 8, 1997, Letter from United States Attorney Sheldon Whitehouse, (Apdx. A-46 - A-47), in which the government informs the court, for the first time and almost two years after petitioner's trial, that a list of trial attendees had been maintained.

These admission procedures and the maintenance of this "intelligence" list, were purportedly utilized by the Marshal's Service to assess whether the people seeking admission were - in any marshal's individual opinion - "good or evil." (Apdx. B-109 - B-110) The marshals manning the identification checkpoint had the unilateral authority to refuse admission to any member of the public who a marshal felt should not be admitted. (Apdx. B-104)

Because defense counsel had never been notified that these admission procedures were going to be imposed, at the initiation of the second day of trial, defense counsel asked to be heard by the district court. (Apdx. B-80 - B-85) He informed Judge Torres that members of the public who sought entry into the courtroom were being required to provide picture identification to the Marshal's Service and had to agree to have this information recorded on a list which would memorialize the names of all persons who attended the trial. (Apdx. B-82, 83) He further informed the court that people were being "turned away" by the marhsalls. (Apdx. B-82) At the time, defense counsel vigorously objected to these procedures as violative of the defendants' constitutional rights to a public trial and requested that the district court order that the marshals immediately cease and desist. (Apdx. B-82, 83) Counsel for the government briefly responded by expressing his view that the procedures enhanced courtroom security and that such matters were best left to the discretion of the Marshal's Service, given their "expertise" in this area. (Apdx.

B-82) Defense counsel nonetheless pressed the district court, arguing that if there was some extraordinary security" basis for these admission requirements, then the court should hold a hearing and should not simply rely upon the government's observations that the Marshal's Service "apparently" believed these procedures were necessary or appropriate. (Apdx. B-82)

Nonetheless, the district court refused to conduct any further factual inquiry and refused to direct the marshals to desist from restricting free access to the courtroom. The court ruled:

> We don't need to have a hearing on this because I think we've already had some hearings previously in this case with regard to other measures that have been taken. I don't believe that requiring identification in any way restricts anyone's right to come into the courtroom. It's a simple matter of identification and that does not bar anyone from coming into the courtroom.

(Apdx. B-84) No further action was ever taken by the court and these admission procedures were maintained and enforced throughout the trial. On October 26, 1995, the defendant was found guilty. On January 26, 1996 he was sentenced to a one hundred and twenty-six month term of imprisonment, a fine of $25,000.00 and a special assessment of $100.00.

In petitioner's appeal to the First Circuit Court of Appeals, he argued inter alia, that he had been deprived of his constitutional rights to a "public trial" by the partial closure of the courtroom which occurred as a result of these admission procedures. Following oral argument of the appeal, on May 9, 1997 the First Circuit issued an Order remanding the case to the district court "for findings as to the factual bases of its Order dismissing defendant-appellant's objections to the security procedures instituted by the United States Marshal's Service, for screening would be trial attendees." (Apdx. A-41) The First Circuit further noted that, "[t]he [District] Court may, if it deems necessary to do so, conduct evidentiary hearings before responding." (Apdx. A-42)

Judge Torres' initial response to the remand order was to issue a memorandum which he denominated "Findings and Reasons." (Apdx. B-48 - B-59) Judge Torres issued his "Findings and Reasons" before conducting any hearing or otherwise making any factual inquiries with regard to the issue on remand.

Thereafter, on June 16, 1997, the district court held a remand hearing. The hearing began with defense counsel inquiring of Judge Torres whether or not there had been, prior to the commencement of the trial, any discussions between the court and law enforcement representatives concerning the necessity for, or the institution of, any extraordinary "security measures." Defense counsel further asked the court whether

any allegations had been made that the defendants or anyone else, presented some unique security risk at the trial. (Apdx. B-89, 90) Judge Torres responded by explaining that he had not "devised" or "ordered" any of the procedures employed and moreover, that he had no recollection of having had any discussions with anyone concerning the implementation of any security procedures. (Apdx. 89) However, he did indicate that he had ratified such measures in other trials. (Apdx. B-89)

Following this brief colloquy between the court and counsel, the defense called their first witness, John J. Leyden, the United States Marshal for the District of Rhode Island. Contrary to the district court's recollection, Marshal Leyden testified that approximately one to two weeks prior to the commencement of the trial, he and a deputy marshal had in fact met with Judge Torres in chambers specifically to discuss "security measures" for the forthcoming trial. (Apdx. B-92) Defense counsel was not notified of the meeting, there was no court reporter present, and to Marshal Leyden's knowledge, no record of any kind was made concerning what was discussed or what decisions were reached. (Apdx. B-90 - B-92)

Marshal Leyden next testified that during the meeting, he had told the district court that it was his intention to implement an admission procedure, whereby all members of the public who sought to attend the trial would be required to present identification as a "precondition" to gaining entrance

to the courtroom. (Apdx. B-94 - B-95) Marshal Leyden recalled that Judge Torres authorized the procedures without inquiry as to the method or specifics by which they would be implemented. (Apdx. B-98) In fact, Marshal Leyden testified that during the time that the marshals briefed Judge Torres as to the proposed admission procedures, he "didn't say anything." (Apdx. B-98)

The remand hearing represented the first instance in which the district court addressed the admission procedures in their totality. This is partly because, in meeting with Judge Torres prior to trial, Marshal Leyden had omitted key aspects of his plan to implement "screening" procedures and as the court did not inquire as to the specifics of the plan, it was unaware of the full scope of the procedures which were ultimately employed. To this end, Marshal Leyden confirmed at the remand hearing that although he told the court that the marshals would be "ask[ing] for their [prospective attendees'] ID of a license so that they could prove who they were . . .," (Apdx. B-94) he did not tell Judge Torres that the Marshal's Service further intended to maintain a permanent list of all the people who sought ingress to the courtroom or that the list being compiled was for the purpose of gathering law enforcement "intelligence." (Apdx. B-98 - B-110) Marshal Leyden also confirmed that no one from the Marshal's Service informed the court, nor did the court ever inquire: (1) that Marshal Leyden had empowered his deputy marshals manning the desk to unilaterally deny access to the courtroom

to any member of the public that they did not feel should attend; (2) that spectators were in fact turned away for their failure to provide identification acceptable to the marshals; (3) to what purpose the list of names and identification information would be put to by the Marshal's Service. (Apdx. B-115) Finally, the record establishes that the court was unaware that the marshals were running "criminal history record checks" on many of the individuals who attended.

The remand hearing was also the first instance in which defense counsel had any opportunity to inquire as to the reasons why these proceedings were implemented and/or what alternatives were available or even considered. Initially, when questioned by defense counsel, Marshal Leyden testified that these "screening procedures" were implemented solely for the purpose of enhancing courtroom security. (Apdx. B-108) Marshal Leyden further claimed that devising a list of trial attendees allowed deputies who monitored the courtroom entrance to make a judgment as to who was "good and evil." (Apdx. B-109 - B-110) However, eventually, Marshal Leyden conceded that the "screening procedures" were also implemented for "purposes of [gathering] intelligence." (Apdx. B-110) In addition, Marshal Leyden testified that the deputy marshall at the door had the discretion to refuse entry to any member of the public that a marshall deemed - for whatever reason - unfit to attend the trial. (Apdx. B-104 -B-106; B-111)

The remand hearing also provided the trial court with the first true picture of the impact that these admission procedures had upon the public's access to the courtroom. The court heard testimony from a number of witnesses who stated that they were turned away by the marshals because they could not present identification suitable to the marshals. One such witness, petitioner DeLuca's sister, testified that although she had attended the trial every day, on the one instance when she forgot her identification, she was turned away.

David P. Difilippo, the editor of Italia U.S.A. Newspaper, located in Johnston, Rhode Island, also testified at the remand hearing. He explained that even though he had presented valid working press credentials, the marshals had refused to admit him to the trial. As the record reflects:

Q: [By Defense Counsel] Can you tell us what happened?

A: [Mr. Defilippo] I went to one of the marshals outside, and I presented my working press ID, and I was told it was insufficient.

Q: And what then happened?

A: Well, he [the marshal] said, well, that is my business card and he said well, that's just an Italian paper anyway.

Q: And what happened after that?

A: He also accused me or asked if I was related to Mr. DeLuca.

Q: Did you answer him?

A: I told him, I said, well, I'm Di, he's De in a nonoffending way. I just wanted to let him know that not all Italians were related, number one. That I was here on a legitimate purpose to work, not to cover a trial on a day-to-day basis and I was still refused admittance. (Apdx. B-123)

At the remand hearing, Marshal Leyden also testified that in addition to all of the traditional security devices which were utilized throughout the courthouse - i.e., magnetometers, x-ray machines, etc. - there were no obstacles to utilizing additional security devices near or in the courtroom itself. He confirmed that the Marshal's Service had the authority and ability to place additional magnetometers directly outside the courtroom door and/or could have placed security cameras at the entrance to the courtroom. (Apdx. B-120 - B-121) However, the record confirms that neither the marshals, nor the district court, ever considered these less intrusive alternatives.

At the conclusion of the remand hearing, on July 8, 1997, Judge Torres issued a memorandum setting forth his "Supplemental Findings And Conclusions." (Apdx. B-60 -B-77) Therein, the district court simply reiterated its previous findings in support of its conclusion that the measures adopted by the marshals were proper. Judge Torres' conclusions were unabated by his seemingly obverse finding that the marshals implemented measures which in no way furthered any goal of contemporaneous security enhancement. As the memorandum reflects:

> Although obtaining birth dates could have served a substantial courtroom security need by permitting marshals to check the criminal histories of spectators arousing their suspicions, in fact, it did not serve that need because such checks were not made at or near the time that spectators were admitted into the courtroom.

(Apdx. B-76 - B-77) Over defense objection that the government bore the burden of going forward at the remand hearing, Judge Torres directed that the defendants should proceed first to establish their contentions regarding what "procedures were employed and [whether] people were either excluded or deterred." The court further ruled that following the defendants' factual presentation, the government was then to proffer its evidence to establish that the use of the "security procedures" employed were "justified." As the court stated:

> So I think the starting point here is for the defendants to present whatever evidence they have in support of their claim that there was a deprivation of the right to a public trial, and then it would be up to the government to justify whatever those procedures were.

The defendants called 12 witnesses to demonstrate that at least a partial closure had occurred as a result of the marshal's admission procedures and that members of the public had, in fact, been denied admission. Many of these witnesses

testified that they had either been denied admission or had elected not to attend - when they otherwise would have - because they did not want to be put on a law enforcement list and possibly investigated.

At the conclusion of the defendant's presentation, the government did not offer a single witness to rebut any of the defendant's proof or to justify the admission procedure employed.[2]

Nevertheless, on February 27, 1998, the Court of Appeals For The First Circuit affirmed the district court order ratifying the partial closure that had occurred. Unfortunately, rather than conducting a plenary review of petitioner's claims, the appellate panel merely deferred to the findings which were made by Judge Torres after the case had been remanded. On April 14, 1998, the Court of Appeals denied, without opinion, defendants' Petitions For Rehearing With The Suggestion For Rehearing In Banc.

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[2]As the record of the June 16, 1997 Remand Hearing indicates:

AUSA MADDEN:	We don't have any witnesses to present. Thank you, Your Honor.
THE COURT:	You say you do not have any witnesses?
AUSA MADDEN:	No witnesses.

REASONS FOR GRANTING THE WRIT

It is respectfully asserted that the instant case presents truly compelling reasons for this Court to grant the Writ of Certiorari. If the decision by the Court of Appeals is allowed to stand, this case will serve as authority to permit law enforcement agencies not only to monitor - but to actually restrict - access by the general public to criminal trials. The right to a public trial is a fundamental precept of the American judicial system. Nothing could be more clear from the record established in this case but that the petitioner's constitutional rights were violated. Review by this Court is necessary not only to redress the injustice which occurred in this case, but to insure that law enforcement agencies do not arrogate to themselves the authority to decide who shall be permitted to attend public criminal trials in this country and who shall not.

The Sixth Amendment confers upon a defendant in a criminal trial the right to an open and public trial. Waller v. Georgia, 467 U.S. 39, 43 (1984). The various policies that underlie the guarantee to a public trial include insuring that the defendant receives a fair trial, maintaining the public's confidence in the criminal justice system, providing an outlet for community reaction to crime, insuring that judges and prosecutors carry out their duties responsibly, encouraging witnesses to come forward, and discouraging perjury. See Waller, 467 U.S. at 46; Press-Enterprise Co. v. Superior Ct.

(Press-Enterprise I), 464 U.S. 501, 508-09 (1984). Surely, the right to a public trial inures to the benefit of the accused, yet its "community therapeutic value" also serves important societal interests. As Chief Justice Burger stated in Press-Enterprise I:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. [emphasis added]

Press-Enterprise I, 464 U.S. at 509 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-71 (1980)).

Furthermore, due to the constitutional magnitude of the right and the recognized difficulty that a defendant would have in establishing how he was harmed by a violation

thereof, it is well settled that a defendant need not establish prejudice in order to obtain relief. See Waller, 467 U.S. at 49 (and cases cited therein at n.9).[3]

To insure that this right is not unjustifiably abridged, the Court has articulated the following four-pronged test which must be strictly applied before any form of closure is permissible: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the court must consider reasonable alternatives;[4] and (4) the court must make findings adequate to support the closure and specific enough that a reviewing court can determine whether the order was properly entered. Waller, supra, 467 U.S. at 45, 48; Press-Enterprise I, supra, 464 U.S. at 510.

In reviewing petitioner's constitutional claims, the Court of Appeals found that the admission procedures adopted by the marshals amounted to a "partial" closure of the proceedings. (Apdx. A-18) Having once made this determination, several principles were triggered. First, in the

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[3]This principle applies equally to those cases where the court determines that a "partial" closure has been effectuated. See, eg., Guzman v. Scully, 80 F.3d 772, 776 (2d Cir. 1996).

[4]The court must consider even those alternatives that might be "cumbersome." See Press Enterprise Co. v. Superior Ct. (Press-Enterprise II), 478 U.S. 1, 15 (1986).

face of a "partial closure," the standard of review became that of de novo or plenary review, not "abuse of discretion."[5] Second, once a partial "closure" was found, there was no requirement that the defendant demonstrate any prejudice in order to secure a reversal. Third, the four part test established by the Court in Waller v. Georgia, 467 U.S. 39, 43 (1984), became the calculus which had to be applied in determining whether or not the closure was justified and therefore constitutionally permissible.

Nevertheless, it is clear from the opinion below, as well as the authority relied upon by the Court of Appeals, that it reviewed petitioner's Sixth Amendment claims under an "abuse of discretion" standard. Expressing their view that an appellate court should "hesitate to displace the trial court's judgement call" and that "substantial deference [was] due the district court's assessment that the screening procedures were warranted . . .," (Apdx. 21-22), the appellate panel cited four cases as authority for their conclusion that the findings and assessments of the lower court should be deferred to.

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[5]See United States v. Osborne, 68 F.3d 94, 98 (5th Cir. 1995) ("We review this question of constitutional law de novo."); accord, Rossetti v. Curran, 80 F.3d 1, 3 (1st Cir. 1996); United States v. Gabriele, 63 F.3d 61, 65 (1st Cir. 1995); United States v. Aguilar-Aranceta, 957 F.2d 18, 21 (1st Cir.), cert. denied, 506 U.S. 834 (1982); United States v. DiPietro, 936 F.2d 6, 8 (1st Cir. 1991).

However, the problem with the Court of Appeals' reliance on these cases was that each case involved the propriety of various forms of "security measures" imposed by a trial court and none of the cases involved any form of "closure." Since none of these cases involved the constitutional question of whether a partial closure was warranted, in each case the "abuse of discretion" standard vis-a-vis de novo review, was applied.[6]

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[6]The four cases relied upon were: United States v. Brooks, 125 F.3d 484 (7th Cir. 1997)[abuse of discretion applied in determining whether security concerns justified seating four marshals directly behind the defense table]; United States v. Childress, 58 F.3d 693 (D.C. Cir. 1995) [sequestration of the jury is reviewed under abuse of discretion standard]; United States v. San Juan Star Co., 662 F.2d 108, 117 (1st Cir. 1981)[decision to enter protective order restraining dissemination of information obtained through discovery subject to abuse of discretion review]; Elledge v. Dugger, 823 F.2d 1439, (11th Cir.), cert. denied, 485 U.S. 1014 (1988) (Edmonson, J., concurring) [decision to shackle defendant throughout the sentencing hearing is one that is best left to the discretion of the trial court].

The panel's reliance on the concurring opinion in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) (per curiam opinion), is altogether puzzling. In Elledge, the

(continued...)

Most respectfully, the Court of Appeals also erroneously deferred to the conclusions, findings and assessments of the district court in determining whether the four part test established in Waller was met. In fact, the panel did not undertake - as it was otherwise required to do - an independent analysis of each prong of the four part Waller test. Instead, they simply affirmed, generally finding that the district court's conclusions that the standards in Waller had been satisfied should be deferred to.

Had the panel conducted the required plenary review, it would have concluded that the first prong of the Waller test was not satisfied here. Since this Court decided Waller, a majority of the circuits have held that in order to overcome a defendant's right to have unfettered public access to his criminal trial, the party seeking to impose a "partial" restriction must advance a "substantial reason" to override the defendant's constitutional right. In the present case, the government never advanced a "substantial reason." In fact,

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(...continued)
majority remanded to the trial court precisely because it had failed to make a specific inquiry into the necessity of shackling the defendant. Rather than granting defense counsel's request to allow a further inquiry into the matter, the trial court merely placed on the record representations made to it by security personnel who were of the opinion that defendant posed a security threat to the courtroom.

other than referring to amorphus "security" concerns, they offered no specific justification for the closure at all.

Waller and its progeny make it unmistakably clear that a trial court may not simply defer to "broad and general" allegations when assessing the propriety of a closure, but rather, must ascertain whether a specific and "substantial" interest exists which would override a defendant's otherwise absolute right to a public trial. See Waller, 467 U.S. at 48. Here, the trial court never challenged the government's assertions - either at the pretrial meeting with the Marshal's Service or when defense counsel objected at trial - that "security" concerns somehow necessitated a partial closure. In fact, a fair reading of the record compels the conclusion that Judge Torres simply abdicated these matters to the United States Marshal's Service.[7] Thus, no argument can be made that the trial court sufficiently put the government to the task of demonstrating a "substantial" reason for the closure.

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[7]Notably, although district courts are allowed substantial deference in matters of courtroom security, the case law makes clear that such considerations must be made exclusively by the court, and may not be delegated to those charged with maintaining courtroom security. See Brewster v. Bordenkircher, 745 F.2d 913, 916 (4th Cir. 1984); Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).

It is also germane to note that the trial court similarly failed to provide members of the press or the general public any opportunity to address the propriety or necessity of these admission procedures or whether less intrusive means could have been fashioned. In Globe Newspaper Co. v. Superior Court, Etc., 457 U.S. 596, 609 n.25 (1982) (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979)), Justice Brennan opined that: "[o]f course, for a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" The intrinsic value of this principle was made self-evident here, because the first instance in which defense counsel was given any opportunity to explore the propriety of the admission procedures, it was discovered - and indeed, the district court subsequently found - that several aspects of the marshal's plan did not "serve a substantial courtroom security need." (Apdx. B-75 [Supplemental Findings, Torres, J.]).

Because the trial court failed to adequately assess whether a "substantial reason" had been put forth by the government "before" it authorized the identification procedures,[8] the appellate court reviewing petitioner's Sixth Amendment claim should have determined that the first prong of the Waller test was not satisfied. Nonetheless, relying on

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[8]See Douglas v. Wainwright, 739 F.2d 531, 532 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

the lower court's supplemental findings, the panel concluded that a "substantial" reason justified Judge Torres permitting the partial closure. This determination ignored the true state of the record, which irrefutably confirmed that none of the factors which the trial court subsequently pointed to on remand - as justification for the partial closure - were even known to the district court at the time the decision to limit access was made.

Nor should the appellate panel have relied upon the lower court's assertion that the government's allegations need not have been challenged because, "we've already had some hearings previously in this case with regard to other measures that have taken place." (Apdx. B-83) Presumably, the district court was referencing its decision to empanel and partially sequester an anonymous jury. However, the decision regarding the jury was predicated, in the main, upon considerations of insuring that no opportunity existed which would have permitted anyone to contact the jurors, rather than any unusual findings regarding the threat of dangerous acts being carried out in the courtroom.

Traditionally, "with the interest in favor of closure merely alleged but not established, there [can] be no compliance with the second requirement that the closure be 'no broader than necessary to protect' the interest."[9] Here,

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[9]Guzman v. Scully, 80 F.3d 772, 776 (2d Cir. 1996) (quoting Waller, 467 U.S. at 48).

since the government never put forth any reason why these admission procedures were necessary or indispensable, it was functionally impossible for the trial court to determine whether the challenged procedures were overbroad. Nevertheless, had the appellate panel reviewed petitioner's claims de novo - and in light of the testimony elicited at the remand hearing - it should have found: (1) that the identification procedures were clearly overbroad as they did not serve to advance any articulated, "substantial," security interest(s), and (2) that the trial court failed to fulfill its obligation to consider alternative measures - such as the placement of a magnetometer at the courtroom door - that would have placed less of a burden upon petitioner's constitutional right to a public trial.

It is also relevant that under examination by defense counsel, Marshal Leyden conceded that the "intelligence" data gathered by the Marshal's Service at the courtroom door was not reviewed contemporaneously with an individual's attendance at the trial, but rather several days later if at all. (Apdx. B-109, B-113) Therefore, no argument can be fashioned - nor was any made by the government below - that obtaining an individual's name and identification and/or running criminal history checks in a seemingly indiscriminate manner, somehow spontaneously enhanced security. If this reasoning is sufficient to justify a partial closure of a courtroom, then it can be applied in virtually every criminal trial. All the Marshal's Service need say is that they want to

know - albeit even after the fact - who attended the trial so they can assess whether "good people" or "evil people" are attending. If this is the standard, the concept of a "public trial" in criminal proceedings will be changed for all time.

Nor was it proper for either the appellate panel or the lower court to rely upon the fact that - as noted by the district court - the trial was purportedly well attended. The record clearly reflects that individuals who were in no way shown to be security threats - including a member of the press and petitioner's sister - were turned away from the courtroom because they did not satisfy the marshal's admission requirements.

In addition to the individuals who the defense was able to determine - through investigation - had actually been turned away at the trial, many other members of the public who might otherwise have attended the trial, were undoubtedly "chilled" from attending as the result of the description of these admission procedures which appeared in a newspaper article during the pendency of the trial. (See Apdx. C-123 - C-126)[10] The day after the trial began, W. Zachary Malinowski, a staff writer for the Providence Journal

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[10]Even the district court conceded that the knowledge held by members of the public that the "screening procedures" were implemented for purposes of "intelligence" may well have "chilled" public attendance of the trial. (Apdx. A-23 [Opinion of the First Circuit, Fn.10]).

- Bulletin, wrote an article reporting on the trial. In the article, he explained that: "[m]arshals were posted outside the courtroom doorway, recording the names and driver license numbers of the [thirty-one] spectators who entered." (Apdx. C-125) The article further explained that one of the marshals had commented that the list of names and identification information being gathered, provided the Marshal's Service with "good intelligence." (Id.) Thus, it was publicly known that anyone who attended this trial might well become the subject of law enforcement investigations.

In this regard, it is respectfully submitted that both the district court and the Court of Appeals simply refused to acknowledge the real dynamics of what took place at this trial. Neither court even touched upon the self-evident impact that such procedures must have had upon the public. Can there be any real question that under the circumstances extant, that there were many reasons why a reasonable person might have been reluctant to attend this trial. A person may not want to be "on record" as having attended a trial involving defendants who the newspaper had suggested had organized crime ties. Such a person might well fear that if he was known to have attended the trial, that he too might be perceived by the government to be associated in some fashion with organized crime or the criminal activities at issue. A person could justifiably believe that if he was on a list as having attended this trial, he might be viewed by law enforcement as having somehow "supported" the defendants

and the government might seek to investigate or harass him. Such concerns are not illusory. Indeed, as one district court has noted:

> A court is a public place where justice is dispensed, and it is a place anyone should be able to attend without fear that his attendance will be recorded and used to link him to criminals or others of interest to police or intelligence agencies. Safety from such practices is one of the characteristics distinguishing a free society from a totalitarian one.

United States v. Whitehorn, 710 F. Supp. 803, 836 (D.D.C. 1989).[11] Cf. McIntyre v. Ohio Elections Commission, 513 U.S. 334, 341 (1995) (author's decision to remain anonymous is protected by the First Amendment; "[t]he decision in favor of anonymity may be motivated by fear of economic or

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[11]The comments of the Whitehorn court were made in support of its ruling that two cameras in the courtroom could not be used for "intelligence purposes."

official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").[12]

The admission procedures employed were also overbroad because security measures that were already in place ensured that any purported "security" concerns had already been addressed. Over objections by defense counsel, Judge Torres had ordered the empanelment and partial sequestration of the jury, measures which the appellate panel described as "significant protections beyond the confines of the courtroom." All members of the public who sought to

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[12]In holding that the criminal history background checks were proper, the panel relied upon the district court's finding that "information gathered was not made available to other law enforcement agencies." Yet, the record clearly reflects that the issue of whether the data was disseminated to other agencies was left unresolved by the remand hearing. The district court relied solely upon the testimony of Marshal Leyden, that to his knowledge the list was not circulated to any other government agency. However, one will quickly discern from the record that Marshal Leyden was remarkably uninformed about what happened to the "list" after it was created or to what purpose it was put. Indeed, when asked at the remand hearing what happened to the list after the trial, Leyden responded: "I believe it was kept in the Deputy's desk but I'm not positive of that." (Apdx. B-111)

attend the trial had to pass through magnetometers at the public entrance and were subject to body searches by marshals. Finally, video surveillance was already in place which allowed the marshals to monitor anyone who entered the courthouse.

In addition, during Marshal Leyden's testimony, he conceded: (1) that placing a magnetometer at the courtroom door was possible; (2) that nothing prevented the marshals from doing so during the trial; and (3) that such procedures had been employed in prior cases. Leyden also confirmed that it was equally possible for the marshals to install video surveillance devices outside of the courtroom door. Of course, these alternative measures were never even considered by the district court as a result of its refusal to make a factual inquiry of any kind when the issue was objected to by defense counsel at trial.

Leyden's testimony provides a good example of why plenary review by the Court of Appeals was so necessary in this case. One of the reasons that the district court claimed that the admission procedures were necessary, was to insure that no one could have smuggled any weapons into the courtroom. However, the most obvious procedure to address that potential threat - if indeed such a realistic threat ever existed - was not even raised, much less considered (i.e., placement of a magnetometer at the courtroom door). Axiomatically, checking someone's ID is not going to determine whether he has a weapon or not. It is difficult to

imagine that this Court, reviewing the record de novo, would have found that the "intelligence gathering" procedures instituted by the Marshal's Service and ratified by the district court, were either the most effective and/or the most narrowly tailored security procedures available. When the appellate panel elected to defer to the district court's conclusions, rather than to independently evaluate the facts presented below, the petitioner was deprived of due process because applying this standard of appellate review was insufficient to protect his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully asserted that a Petition For A Writ Of Certiorari should be granted.

Dated: New York, New York
July 13, 1998

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1173

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT P. DeLUCA, SR.,
Defendant, Appellant.

No. 96-1221

UNITED STATES OF AMERICA,
Appellee,

v.

GERARD T. OUIMETTE,
Defendant, Appellant.

No. 96-2231

UNITED STATES OF AMERICA,
Appellee,

v.

GERARD T. OUIMETTE,
Defendant, Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, U.S. District Judge]

Before
Selya, Circuit Judge,
Coffin and Cyr, Senior Circuit Judges.

John W. Mitchell, with whom Andrew J. Weinstein, Law Offices of Anthony M. Cardinale and LaRossa, Mitchell & Ross were on brief for appellant DeLuca.

Sara Rapport for appellant Ouimette.

Margaret E. Curran, Assistant United States Attorney, with whom Sheldon Whitehouse, United States Attorney, Kenneth P. Madden, Assistant United States Attorney, and James H. Leavey, Assistant United States Attorney, were on brief for appellee.

February 27 ,1998

CYR, Senior Circuit Judge. Defendants Robert P. DeLuca, Sr. ("DeLuca Sr.") and Gerard T. Ouimette appeal their respective convictions for conspiring to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. § 894, and for aiding and abetting the use of extortionate means to collect extensions of credit, in violation of 18 U.S.C. §§ 2, 894. Their principal claim asserts a violation of the Sixth Amendment right to a public trial, see Waller v. Georgia, 467 U.S. 39 (1984), relating to the spectator screening procedure implemented sua sponte by the United States Marshals Service and ratified by the district court. We affirm the district court judgments.

I

BACKGROUND

At issue below were alleged extortion schemes directed against Paul Calenda, a Rhode Island factory and

restaurant owner ("Calenda extortion"), and David Duxbury ("Duxbury extortion"). We relate the background facts in the light most favorable to the verdicts. See Stewart v. Coalter, 48 F.3d 610, 611 (1st Cir. 1995).

A. The Calenda Extortion Scheme

The Calenda extortion was triggered by the March 1994 murder of Ronald Coppola, a close friend and loansharking partner of appellant DeLuca Sr. Coppola had disclosed to DeLuca Sr. that he had advanced $125,000 to a friend and business associate, Paul Calenda. After the Coppola murder, DeLuca Sr. decided to collect the debt himself but was unable to arrange a meeting with Calenda. Eventually, DeLuca Sr. told Coppola's widow, Paula, that he intended to give Calenda a "whack" in retribution for not meeting with him. At about the same time, DeLuca Sr. discussed Calenda with appellant Gerard Ouimette, who in turn informed another Coppola acquaintance, James "Slugger" Gellerman.

In January 1995 Ouimette told Paula Coppola that he would "break [Calenda's] . . . legs" if he failed to repay the $125,000 he owed Coppola. When Calenda denied owing either Coppola or DeLuca Sr., Ouimette and Gellerman visited Calenda at his factory in an effort to collect the Coppola debt. Subsequently, Ouimette confronted Paula Coppola at her home, where he told her boyfriend, Robert Buehne, to summon Calenda by phone. When Calenda arrived at the Coppola residence Ouimette informed him that

a power struggle had developed following Ronald Coppola's death, which Ouimette intended to win, and that Calenda could either pay the $125,000, give Ouimette the restaurant Calenda owned, or risk being blown up in his car.

Sometime around February 20, Ouimette and Gellerman appeared at the Calenda factory and announced that Ouimette intended to take over the Calenda restaurant. A few days later Ouimette met with Joe DeLuca, brother of appellant DeLuca Sr., to discuss the Calenda problem. Following their meeting, Ouimette told Gellerman that he wanted Calenda placed in sufficient fear to cause him to go to Joe DeLuca for help. A few days later Ouimette instructed Gellerman to give Calenda a "smack" and collect $50,000 rather than the $125,000 demanded earlier. Ouimette told another underling, Paul Parenteau, to accompany Gellerman.

On February 27 Gellerman and Parenteau met with Calenda at the Calenda factory. The meeting began with a handshake from Gellerman, accompanied by a sudden, violent blow to Calenda's head. Following the formal introduction, Gellerman instructed Calenda to have the $50,000 ready by the next day. Throughout the encounter, Parenteau remained by the door to prevent anyone from entering or leaving. When Gellerman reported back to Ouimette he was told to stay away from Calenda and not go back to the factory.

About the same time, Paula Coppola, Buehne and Calenda decided to cooperate in an FBI investigation of Ouimette and DeLuca Sr. On March 6, during a telephone

conversation recorded by the FBI, Buehne told Ouimette that Calenda had something for him and wanted to get together. After voicing concern as to whether Calenda was "on the level," Ouimette agreed to the meeting, adding that DeLuca Sr., not Ouimette, had sent Gellerman to the factory to collect the debt and that Gellerman's "impetuous" assault on Calenda had not been authorized by Ouimette. Ouimette also stated that he was going to warn Gellerman to stop using force because he wanted no part of "shakedowns [which] . . . went out with the roaring twenties."

Later that afternoon Ouimette and Calenda met at Calenda's condominium. During their surreptitiously videotaped meeting Ouimette repeated the substance of his earlier conversation with Buehne and reassured Calenda that it had been DeLuca Sr. who sent Gellerman to the factory to collect from Calenda. When Calenda asked how much he would have to pay, Ouimette told him that he and DeLuca Sr. would accept $50,000 even though Calenda owed $125,000. Ouimette then agreed to accept $5,000 per week and Calenda paid him the first installment. Ouimette explained that future installments were to be paid to Buehne, who would deliver them to Ouimette.

At that point Calenda protested that he owed Coppola nothing. Ouimette responded that he knew only what he had been told, then launched into a graphic description of Gellerman's earlier assault against David Duxbury. See infra Section I.B. After assuring Calenda that he planned to

impress upon Gellerman the need to refrain from using force in the future, Ouimette urged Calenda to call if anyone bothered him or there was anything Ouimette could do to help. Following the meeting with Calenda, Ouimette met Gellerman and told him that Buehne would be receiving $5,000 a week from Calenda, out of which Gellerman would get $1,000 weekly. Ouimette then handed Gellerman $1,000 and remarked: "Pauly's [i.e., Calenda's] paying."

On March 11, Ouimette joined Buehne and Paula Coppola at a Providence restaurant, where Buehne was to deliver a $5,000 installment from Calenda. Their conversation was recorded by the FBI, at whose instruction Buehne tendered Ouimette only $1,500 on the pretext that that was all Calenda had given him. Angered, Ouimette told Buehne that Calenda would be in danger unless he came up with the $3,500 balance by the following Monday. Adding that "maybe [by] Tuesday he's going to get a shot," Ouimette also threatened to break the legs of Calenda's longtime friend and housekeeper. Ouimette cautioned that he was unable to control Gellerman, then recounted an abbreviated version of Gellerman's role in the Duxbury assault.

The next day the FBI assumed protective responsibility for Paula Coppola and Buehne, who ultimately entered into a witness protection program. Later, in several recorded conversations with Buehne, Ouimette indicated his continuing intention to collect from Calenda, stating that he would threaten violence to coerce payment.

Finally, an FBI search of the Ouimette residence on March 18 in Fall River, Massachusetts, disclosed currency bearing the recorded serial numbers of bills included in the $5,000 installment Calenda paid Ouimette on March 6 and the $1,500 partial installment Buehne delivered to Ouimette on March 11.

B. The Duxbury Extortion Scheme

On March 1, 1995, as Ouimette and Gellerman were having a drink with codefendant Kenneth Raposa, Ouimette informed them that Robert DeLuca, Jr. ("DeLuca Jr.") had "a little problem"; someone was trying to "shake him down" for $2,500. Thereafter, Ouimette, Gellerman and Raposa went to the Satin Doll, a Providence nightclub, to confront David Duxbury who was suspected of the attempted "shake down."

At the Satin Doll they escorted Duxbury to the basement, where Ouimette demanded to know why Duxbury was trying to extort money from DeLuca Jr. After Duxbury told Gellerman that "it was a joke," Gellerman punched him in the face, causing his nose to bleed profusely. Thereupon, Ouimette grabbed Duxbury, slapped him across the face, told him to show DeLuca Jr. some respect, then informed him that he would have to pay a $5,000 "fine" by the next day for attempting to extort money from DeLuca Jr. As Duxbury wiped the blood from his face, Raposa kicked him twice and reminded him to bring the $5,000 "fine" payment the next day. The Satin Doll incident, lasting about ten minutes, was witnessed in part by three Satin Doll dancers.

Following the assault, Duxbury contacted the FBI and volunteered to cooperate in its investigation of DeLuca Sr. and Ouimette. On March 2 Ouimette instructed Gellerman to collect the $5,000 "fine" from Duxbury. Upon learning that Duxbury was not at work, however, Gellerman told Parenteau to advise Duxbury that the $5,000 "fine" would be collected shortly.

C. The Trial Court Proceedings

A federal grand jury returned a five-count indictment charging Ouimette, DeLuca Sr., Gellerman, DeLuca Jr., and Raposa with conspiracy to collect extensions of credit by extortionate means, in violation of 18 U.S.C. § 894, and with aiding and abetting the collection of extensions of credit by extortionate means, in violation of 18 U.S.C. §§ 2 and 894.[1]

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[1]Count one charged Ouimette and Gellerman with conspiring to collect extensions of credit from Paul Calenda and David Duxbury from December 12, 1994, to March 18, 1995. Count two charged that DeLuca Sr. conspired with Ouimette and Gellerman to collect extensions of credit from Calenda during the same time period. Ouimette and Gellerman were named unindicted conspirators under Count two. Count three charged DeLuca Sr., Ouimette and Gellerman with using extortionate means to collect from Calenda and to punish Calenda for nonpayment of an extension of credit over the same time period. Count four charged DeLuca Jr. and Raposa with conspiring, from March 1 to 18, 1995, with Ouimette and Gellerman, to collect and attempt to collect extensions of credit by extortionate means from David Duxbury. Finally, Count five charged Ouimette, Gellerman, DeLuca Jr. and Raposa with collecting extensions of credit by extortionate means from Duxbury over

The government promptly filed informations aimed at establishing the predicate convictions to enable enhanced penalties against Ouimette, Gellerman and DeLuca Sr., including mandatory life-imprisonment terms pursuant to the so-called "three strikes" provision, see id. § 3559(c).

One week prior to trial the district court granted a government motion to empanel and partially sequester an anonymous jury. The court specifically relied upon its concern that ties between DeLuca Sr. and organized crime could lead to efforts to influence the jury. Appellants' motions to sever their trials were denied as well.[2]

On the second day of trial, appellants complained to the district court that deputy marshals were screening and recording the identification of all would-be trial spectators near the entrance to the courtroom. Appellants requested an evidentiary hearing to determine whether the unauthorized screening procedure amounted to a "closure" in violation of their Sixth Amendment right to a public trial. Adverting to

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the same time period and with punishing Duxbury for nonpayment.

[2]The court allowed a severance relating to DeLuca Jr. and Raposa. Raposa's conviction has been affirmed in an unpublished opinion. See United States v. Raposa, No. 96-1353, 1997 WL 407964 (1st Cir. July 3, 1997) (per curiam). On the eve of appellants' trial, Gellerman pled guilty pursuant to a plea agreement and thereafter cooperated with the government in return for its promise to seek dismissal of the "three strikes" information. See 18 U.S.C. § 3559(c).

the same security concerns which had prompted its earlier decision to empanel an anonymous jury, the district court denied the request for an evidentiary hearing and ratified the spectator-screening procedure.

Following a seven-day jury trial appellants were convicted on all counts. Ouimette was sentenced to life imprisonment. The sentence imposed upon DeLuca Sr. was limited to 126 months because the government failed to establish the requisite predicate convictions for a "three strikes" enhancement. These appeals followed.[3]

Noting the important Sixth Amendment concerns generated by the courtroom-spectator screening procedure, we retained appellate jurisdiction and remanded for factual findings relating to its ratification by the district court. In due course the district court conducted an evidentiary hearing and entered detailed findings.

II

DISCUSSION

A. The Anonymous Jury Empanelment

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[3]Five months after filing a notice of appeal Ouimette moved for a new trial, citing "newly discovered" evidence that he had been falsely implicated by Gellerman. The motion was denied on the ground that the supporting affidavits did not disclose "newly discovered" evidence. United States v. DeLuca, 945 F. Supp. 409 (D.R.I. 1996). The Ouimette appeal from the latter order (No. 96-2231) has been consolidated with the appeals relating to the DeLuca Sr. and Ouimette convictions and sentences (Nos. 96-1173 & 96-1221) in the present proceeding.

Appellants first contend that the decision to empanel an anonymous jury constituted an abuse of discretion. See United States v. Childress, 58 F.3d 693, 702-03 (D.C. Cir. 1995) (per curiam). We disagree.[4]

Although the empanelment of an anonymous jury should be recognized as an extraordinary protective device, especially if it tends to suggest that the jurors may have something to fear from the accused, thereby conceivably encroaching upon the presumption of innocence, see United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995), it is a permissible precaution where (1) there are strong grounds for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused. See United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991).

Our review takes into account not only the evidence available at the time the anonymous empanelment occurred,

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[4]Although appellants also challenge the partial sequestration ruling, we confine our direct discussion to the anonymous empanelment ruling since both rulings in context implicate essentially similar constitutional concerns (i.e., their potential effects on the presumption of innocence). See United States v. Edmond, 52 F.3d 1080, 1092 (D.C. Cir. 1995) (noting that jury sequestration, unlike juror anonymity, does "nothing to insulate jurors against retaliatory attacks after the guilty verdict [is] rendered").

but all relevant evidence introduced at trial. See Krout, 66 F.3d at 1427. We conclude that the record as a whole affords sufficient foundation for empaneling an anonymous jury both as a prudent safety precaution and a means of ensuring unfettered performance of the factfinding function.

First, the record links appellants to organized crime, a factor which strongly indicated that clandestine "outside" assistance might be brought to bear in any effort to intimidate or punish jurors. See United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994); cf. United States v. Doe, 63 F.3d 121, 130 (2d Cir. 1995) ("The problem of retaliation against those producing adverse testimony is especially acute in the context of criminal organizations . . . . Hence, a district court in such a case might attribute the lack of a direct threat to the very confidentiality that the defendant or witness seeks to preserve.").[5] Moreover, Ouimette's capacity and readiness to enlist criminal confederates in jury tampering plans was supported by actual precedent.[6] See Ross, 33 F.3d at 1520

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[5]A RICO conspiracy indictment previously filed in United States v. DeLuca, Crim. No. 94-10287-MLW (D. Mass.), alleged that DeLuca Sr. belonged to the Patriarca crime family. The recorded conversations introduced at trial below contained statements by Ouimette relating to organized crime organizations based in New York.

[6]In 1982 the Rhode Island State Police stopped an automobile carrying several convicted felons in possession of a metal pipe, a loaded firearm, and a list identifying the individual jurors empaneled to try Ouimette in a pending criminal case.

(court may consider "defendant's past attempts to interfere with the judicial process"); United States v. Tutino, 883 F.2d 1125, 1132-33 (2d Cir. 1989).

Second, both Ouimette and DeLuca Sr. have long been involved in violent crimes, including robbery, assault with a dangerous weapon, larceny in a dwelling, and conspiracy to commit murder, not to mention their violent extortions in the instant case. See United States v. Riggio, 70 F.3d 336, 339-40 (5th Cir. 1995).

Third, appellants also attempted to tamper with witnesses and to suborn perjury in the instant case. DeLuca Sr. and Ouimette, through intermediaries, pressured prospective prosecution witnesses, Paula Coppola and Robert Buehne, to perjure themselves, and offered $5,000 to another prospective government witness, David Duxbury, to abscond prior to trial. Thereafter, when Duxbury nevertheless showed up at a pretrial hearing, Ouimette told an associate: "If we can't get [Duxbury], we'll get one of his kids." See United States v. Edmond, 52 F.3d 1080, 1091-92 (D.C. Cir. 1995) (noting that a general preparedness to obstruct the judicial process may serve as indirect evidence of readiness to engage in jury tampering as well); United States v. Aulicino, 44 F.3d 1102, 1116 (2d Cir. 1995) (same).

Fourth, both Ouimette and DeLuca were confronting mandatory lifetime sentences upon conviction, which surely provided a strong inducement to resort to extreme measures in any effort to influence the outcome of their trial. See Ross,

33 F.3d at 1520. Moreover, their trial was prominently and extensively covered by local print and electronic media (e.g., several lengthy front-page stories in the Providence Journal), to the degree that any public disclosure of the jurors' identities would have enhanced the practicability, hence the likelihood, of efforts to harass, intimidate, or harm the jurors.[7]

Finally, the district court adopted prudent measures designed to safeguard defendants' constitutional rights by informing the members of the jury that their identities would not be disclosed, so as to ensure that no extrajudicial information could be communicated to them during trial, either by the public or by media representatives. Thus, the court explained, the constitutional right of each defendant to a jury trial, based exclusively on the evidence, would be preserved.

In our view, the district court thereby satisfactorily averted any unacceptable risk of intrusion upon the constitutional rights of the individual defendants by diverting juror attention from the possible perception that anonymous empanelment was a safeguard against defendants'

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[7]While Ouimette maintains that no single factor warranted the anonymous empanelment, it is the totality of the circumstances which we consider. See United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995). Likewise unavailing is the plaint that some of the evidence of prior jury and witness tampering efforts was disputed. There is neither authority nor sound reason for requiring that trial court findings in this regard be established beyond a reasonable doubt. Cf. 18 U.S.C. § 3432.

dangerousness. See United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); Ross, 33 F.3d at 1520; Paccione, 949 F.2d at 1192. Accordingly, given the demonstrated need, coupled with the cautionary instruction fashioned by the district court, the anonymous jury empanelment did not constitute an abuse of discretion.

B. The Procedural Impediments to Courtroom Access by Spectators

The United States Marshal, acting sua sponte on the first day of trial, established a screening and identification procedure whereby each would-be spectator was required to present written identification before being allowed to enter the courtroom. Deputy marshals examined whatever written identification was presented, then recorded the type of identification and the bearer's name, address and birth date. The recorded information was retained by the United States Marshal for use in determining whether the bearer had a criminal background or any connection with a defendant on trial, such as might indicate a courtroom security risk. On the second day of trial the district court ratified the spectator screening procedure over appellants' objections. See supra Section I.C.

Appellants contend on appeal that the screening procedure violated their Sixth Amendment right to a public trial. As their claims have been preserved, see United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.) (Campbell, J.) (finding no waiver in similar circumstances), cert. denied, 118

S. Ct. 79 (1997), our review is plenary, United States v. Osborne, 68 F.3d 94, 98 (5th Cir. 1995).

The Sixth Amendment right to a public trial enures to the benefit of the criminal justice system itself as well as the defendant, by enhancing due process, encouraging witnesses to come forward, and enabling the public at large to confirm that the accused are dealt with fairly and that the trial participants properly perform their respective functions. See Waller, 467 U.S. at 46; see also Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992). Due to the important individual rights and public interests at stake, an alleged violation of the Sixth Amendment right to a public trial resulting from a "total" closure is not subject to "harmless error" analysis. Waller, 467 U.S. at 49 n.9 (stating that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury") (citations and internal quotation marks omitted). Nevertheless, the Sixth Amendment right to a public trial is not absolute and must on occasion yield to competing interests in the fair and efficient administration of justice. Id. at 45.

The government initially urges, as a matter of law, that the Sixth Amendment right to a public trial was never implicated in the present case because the challenged screening procedure effected neither a total nor a partial closure. According to the government, a "closure" occurs

only if the trial court unconditionally excludes persons from the courtroom, but not if it simply imposes universal preconditions on courtroom access which have the incidental effect of barring only those persons who elect not to comply. To cite an obvious example, magnetometer screenings are designed to prevent armed spectators from entering the courtroom, yet no one would suggest that conditioning spectator access on submission to reasonable security screening procedures for dangerous weapons violates the Sixth Amendment right to a public trial. Furthermore, the government correctly notes, no authority squarely holds that such "universal" preconditions to courtroom access constitute a Sixth Amendment "closure." Cf. Brazel, 102 F.3d at 1155 (assuming, arguendo, that similar identification procedure amounted to "partial" closure). We need not opt for the broad rule urged by the government, however, since the security screening procedure utilized below amounted at most to a permissible "partial" closure.

Although we have yet to rule on the matter, cf. Martin v. Bissonnette, 118 F.3d 871, 874 (1st Cir. 1997), several other courts of appeals have held that the Sixth Amendment test laid down in Waller, 467 U.S. at 48, need be less stringent in the "partial" closure context; that is to say, a "substantial reason," rather than an "overriding interest," see id., may warrant a closure which ensures at least some public access. See Osborne, 68 F.3d at 98-99; United States v. Farmer, 32 F.3d 369, 371-72 (8th Cir. 1994); Woods, 977 F.2d at 76;

United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989); Douglas v. Wainright, 739 F.2d 531, 533 (11th Cir. 1984) (per curiam). These courts essentially conclude that a less stringent standard is warranted in the "partial" closure context provided the essential purposes of the "public trial" guarantee are served and the constitutional rights of defendants are adequately protected. See, e.g., Osborne, 68 F.3d at 99; Woods, 977 F.2d at 76. As yet, no court of appeals has held otherwise.

Unlike the "total" closure in Waller, 467 U.S. at 42, which excluded all persons (other than court personnel, witnesses, parties and trial counsel) throughout the entire suppression hearing, the screening and identification procedure employed below effected at most a "partial" closure, as it (1) barred only those would-be spectators who opted not to submit written identification, and (2) presumably may have "chilled" attendance by some potential spectators who opted not to present themselves at the courthouse. Cf. Woods, 977 F.2d at 74 (finding "partial" closure where members of defendant's family were excluded while particular witness testified). Moreover, the district court supportably found that members of the general public, as well as members of the defendants' families, attended throughout the seven-day trial, cf. id. at 76, as did credentialed representatives of the print and electronic media, see Douglas v. Wainwright, 714 F.2d 1532, 1541 (11th Cir. 1983) (noting that media presence

and coverage renders court order one for "partial" closure rather than total, by increasing the likelihood that witnesses with material evidence who are unknown to the parties may learn of perjured testimony through media reports even though they themselves do not attend the trial), vacated and remanded, 468 U.S. 1206 (1984), reinstated, 739 F.2d 531 (11th Cir. 1985).

Relying on the requirement that a closure be "no broader than necessary" to promote the asserted justification, Waller, 467 U.S. at 48, appellants suggest, alternatively, that (1) the anonymous empanelment and partial sequestration adequately addressed any legitimate security concerns, see supra Section II.A, or (2) the court could have resorted to less restrictive security measures, such as installing magnetometers immediately outside the courtroom. In addressing these contentions, we note at the outset that since the spectator-screening procedure resulted at most in a "partial" closure, the government was not required to establish that it furthered a "compelling" interest but simply a "substantial" one. See, e.g., Osborne, 68 F.3d at 98-99.

Although anonymous empanelment and partial sequestration may afford jurors significant protections beyond the confines of the courtroom, prophylactic procedures of an entirely different nature may be required to safeguard against attempts to intimidate jurors and witnesses in the performance

of their courtroom responsibilities.[8] These difficult judgments are matters of courtroom governance which require "a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings[.]" Childress, 58 F.3d at 702. Thus, in our view an appellate court should be hesitant to displace a trial court's judgment call in such circumstances. See id. at 705 ("[T]he trial court's choice of courtroom security procedures requires a subtle reading of the immediate atmosphere and a prediction of potential risks — judgments nearly impossible for appellate courts to second-guess after the fact."); see also United States v. Brooks, 125 F.3d 484, 502 (7th Cir. 1997) ("The decisions of a district court concerning security in the courtroom are reviewed deferentially."); Elledge v. Dugger, 823 F.2d 1439, 1456 (11th Cir. 1987) ("[W]e generally defer to a trial court's discretion in courtroom-security decisions."); cf. In re San Juan Star Co., 662 F.2d 108, 117 (1st Cir. 1981) (noting that appellate court "must defer to the [district] court's . . . close familiarity with the nature of the [trial] publicity involved").

As the Eleventh Circuit acknowledged recently in relation to another spectator-screening procedure, given their

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[8]Nor, of course, do jury sequestration and anonymous empanelment afford protection or anonymity to prosecution witnesses, several of whom were eyewitnesses to appellants' violent extortion practices and at least two of whom later were placed in a witness protection program.

many coincident duties trial judges cannot be expected to scan their courtrooms efficiently on a continuous basis for spectators whose very demeanor might represent an attempt to intimidate a witness or juror. See Brazel, 102 F.3d at 1155 (addressing "fixed stares" directed at witnesses by courtroom spectators). Similarly, in the circumstances presented here we cannot agree that prudent identification procedures suitably focused at deterring would-be trial spectators who may pose unacceptable risks — either to the security of the courtroom or the integrity of the factfinding process — need be held in abeyance pending evidence of an actual attempt to influence or harm a witness or juror in the case on trial. Therefore, though we cannot endorse the unilateral action by the United States Marshal, we hold that it did not strip away the substantial deference due the district court's subsequent assessment that the screening procedures were warranted.[9]

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[9]Appellants also point to the United States Marshal's failure to run criminal background checks before spectators were allowed to enter the courtroom. Leaving aside the practicability of obtaining
background checks in such short order, a matter on which the record is silent, screening procedures aimed at minimizing security risks and functional impediments to trial participants ought not be ruled infirm simply because they may not afford optimum protection. Rather, their deterrent value — in discouraging attendance by those most likely to pose a threat to courtroom security or to impede the factfinding function — represents a substantial benefit in its own right. In the same vein, we think it important to note that measures reasonably

These appellants either were directly associated with prior efforts to obstruct fair factfinding through untruthful trial testimony, or were found to possess the present means as well as ample inducement (viz., avoidance of potential life sentences) to sponsor similar efforts in the case at bar, see supra Section II.A. Moreover, the challenged spectator-screening procedure was reasonably designed to respond to these concerns, as it plainly alerted would-be spectators that their courtroom conduct would be closely monitored, thereby efficiently focusing the desired deterrent effect principally upon those most likely to impede a fair and orderly trial -- particularly appellants' criminal associates. Thus, the challenged screening procedure represented a permissible response to defendants' demonstrated capacity and motivation to undermine the administration of justice at their trial.[10]

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designed to ensure a trial which is not only public, but fair, ought not lightly be discounted in circumstances where the threat to both these constitutional goals stems from the defendants and their associates at large. Cf. Woods, 977 F.2d at 76 (partial closure ordered after witness was threatened by member of defendant's family); United States v. Hernandez, 608 F.2d 741, 748 (9th Cir. 1979) (partial closure ordered after witness and wife received life-threatening calls).

[10]The district court noted its concern that the United States Marshal's pretrial statement to the Providence Journal -- that the spectator-screening procedure was for "intelligence" purposes -- might have "chilled" public attendance. Appellants suggest that readers may have understood that the data gathered through the screening procedure would be used for investigative purposes by

Finally, as the district court supportably found, their extensive criminal histories (not to mention the violent criminal activity alleged in the pending indictment) generated realistic concerns that appellants might circumvent normal courtroom security procedures, as by attempting to coerce or bribe authorized personnel to facilitate the introduction of weapons into the courtroom or elsewhere in the courthouse.[11]

In our view, therefore, the district court order ratifying these screening procedures adequately addressed and significantly minimized the demonstrated potential for

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other law enforcement agencies.

Although we are not unsympathetic to these concerns, the United States Marshal's spontaneous remark to the press did not significantly alter the required Sixth Amendment calculus, for at least three reasons. First, though susceptible to overbroad interpretation, the remark was accurate. The information was retained by the Marshal's Service for "intelligence" purposes; that is, to monitor any courtroom spectators whose identities suggested a risk of juror and witness intimidation efforts. Second, the large numbers of spectators in attendance at the trial each day belies any deterrent effect of constitutional dimension from the "Big Brother" syndrome suggested by appellants. Third, the district court found that the information gathered was not made available to other law enforcement agencies.

[11]The district court specifically found that the courthouse entrances utilized by employees were not equipped with magnetometers and that authorized personnel could enter the courthouse after hours and on weekends without risking detection. Moreover, there was no magnetometer screening device at the courtroom entrance.

harassment and intimidation of jurors and witnesses by would-be trial spectators, for many of the same reasons that warranted the anonymous empanelment and partial jury sequestration. See supra Section II.A. Although any courtroom closure represents a serious undertaking which ought never be initiated without prior judicial authorization, we conclude that the partial closure in this case did not contravene the Sixth Amendment, given the strong circumstantial and historical evidence that precautionary security measures were well warranted and the essential constitutional guarantees of a public trial were preserved.

C. The Motion to Sever[12]

DeLuca Sr. contends that the government violated Criminal Rule 8(b) by joining Counts two and three with Counts one, four and five. See United States v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991) ("The remedy for misjoinder [under Rule 8(b)] is severance."). Rule 8(b) permits multiple defendants to be joined in a single indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b) (emphasis added).

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[12]We review the denial of a Rule 8(b) misjoinder motion de novo, United States v. Edgar, 82 F.3d 499, 503 (1st Cir.), cert. denied, 117 S. Ct. 184 (1996), in light of the facts "responsibly alleged" in the indictment, rather than those established at trial. United States v. Morrow, 39 F.3d 1228, 1237 (1st Cir. 1994). The party asserting misjoinder bears the burden of persuasion. United States v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991).

DeLuca correctly points out that he was not named as a defendant or coconspirator in Count one, see supra note 1, the conspiracy count embracing both the Calenda and Duxbury extortions.

Normally, the government may join multiple defendants in a single indictment provided that at least one count alleges a conspiracy or a continuing criminal enterprise ("CCE") and the indictment separately alleges that the appellant committed a substantive offense [viz., the use of extortionate means by DeLuca Sr. to collect from Calenda] during the course and in furtherance of the "umbrella" conspiracy or CCE. See id. at 307; see also United States v. Rehal, 940 F.2d 1, 3 (1st Cir. 1991) (noting that "[a] conspiracy count can be a sufficient connecting link between . . . multiple offenses that tips the balance in favor of joinder") (quoting United States v. Arruda, 715 F.2d 671, 678 (1st Cir. 1983)); United States v. Luna, 585 F.2d 1, 4 (1st Cir. 1978). For Rule 8(b) purposes in the present context, therefore, the "participation" requirement did not necessitate an allegation that DeLuca Sr. was a coconspirator under Count one, nor that he knew that Gellerman and Ouimette tried to extort money from Duxbury. Id. (noting that defendant's substantive act need not be listed as a predicate for CCE count to warrant joinder). Accordingly, the district court supportably denied the Rule 8(b) motion.

In a related claim, see Fed. R. Crim. P. 14, DeLuca Sr. argues that he was severely prejudiced by the joint trial.

Specifically, he claims, the district court abused its discretion by denying the motion for severance because Ouimette's ominous statements to Paul Calenda — describing Gellerman's violent assault on Duxbury -- so inflamed the jury that it convicted DeLuca Sr. for the less violent Calenda assault merely because he associated with the brutal likes of Ouimette and Gellerman.

We review the challenged ruling only for manifest abuse of discretion, Natanel, 938 F.2d at 308, mindful that "[t]he federal courts have long recognized that consolidated trials tend to promote judicial economy, conserve prosecutorial resources, and foster the consistent resolution of factual disputes common to properly joined defendants." United States v. Josleyn, 99 F.3d 1182, 1188 (1st Cir. 1996), cert. denied, 117 S. Ct. 959 (1997). Thus, DeLuca Sr. was required to make a "strong showing of prejudice." United States v. McLaughlin, 957 F.2d 12, 18 (1st Cir. 1992). No abuse of discretion has been made to appear.

First, a measure of evidentiary spillover is a foreseeable concomitant of virtually every joint trial, yet seldom indicates undue prejudice. United States v. Yefsky, 994 F.2d 885, 896 (1st Cir. 1993). Second, since any evidentiary spillover is vitiated where the evidence in all events would have been admissible against the movant, "[i]n the context of conspiracy, severance will rarely, if ever, be required." United States v. Flores-Rivera, 56 F.3d 319, 325 (1st Cir. 1995) (internal quotation marks and citations

omitted); see Fed. R. Evid. 801(d)(2) (defining, as admissible non-hearsay, statements by defendant's coconspirator during course and in furtherance of conspiracy). So it is here. Ouimette's vivid descriptions of the Duxbury assault clearly facilitated the extortion by inviting Calenda to conclude that he might experience similar treatment unless he met the extortionate demands made by Ouimette.

Finally, the district court took prudent precautions against prejudicial spillover by repeatedly instructing the jury that it must consider the evidence against each individual defendant in relation to each count. See Natanel, 938 F.2d at 308 (noting that such instructions mitigate risk of spillover).

D. The Jury Instructions[13]

1. The "Guilt or Innocence" Instruction

Appellants challenge the district court instruction that the jury was to determine their "guilt or innocence." We have cautioned that the term "innocence" may tend to undercut the presumption of innocence, as the jury might be prompted to

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[13]Although Ouimette challenges the "multiple conspiracy" instruction as well, we review only for "plain error" since neither defendant asserted a contemporaneous objection. United States v. Olano, 507 U.S. 725, 734-35 (1993) (holding that, to avoid miscarriage of justice, appellate court has discretion to correct forfeited error, but only if it was obvious under existing law and defendant can show that it prejudiced his "substantial rights" by altering trial outcome). After reviewing the challenged instruction in the context of the entire jury charge, we find nothing approaching plain error.

convict where the evidence, though inadequate to prove guilt beyond a reasonable doubt, nonetheless indicated that the defendant may not have been "innocent." See United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995) (finding comparable instruction inappropriate, but not "plain error"); United States v. Mendoza-Acevedo, 950 F.2d 1, 4-5 (1st Cir. 1991) (same).[14]

Duly preserved jury-instruction challenges are reviewed for abuse of discretion, United States v. Mitchell, 85 F.3d 800, 809 (1st Cir. 1996), to determine "whether the instructions adequately explained the law or 'whether they tended to confuse or mislead the jury on the controlling issues.'" United States v. Alzanki, 54 F.3d 994, 1001 (1st Cir. 1995) (citations omitted). When the asserted deficiency implicates the government's burden of proof, we inquire whether there is a "reasonable likelihood" that the jury understood the appropriate standard (viz., proof beyond a reasonable doubt). United States v. Romero, 32 F.3d 641, 651 (1st Cir. 1994) (citing Victor v. Nebraska, 511 U.S. 1, 6 (1994)). The challenged instruction is not to be assessed in isolation, however, but in light of the entire jury charge. United States v. DeMasi, 40 F.3d 1306, 1317 (1st Cir. 1994).

As there is no reasonable likelihood that the jury

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[14]The government incorrectly contends that DeLuca Sr. failed to preserve the instant claim. The parties agreed that an objection by one defendant would serve as an objection by all and Ouimette made a contemporaneous objection.

misunderstood the burden of proof the government was required to bear, we find no abuse of discretion. Among the seven references to "guilt or innocence," five occurred in the earliest stages of the jury charge, interspersed with the unobjectionable phrase "guilty or not guilty." Thereafter, the court explained or used the phrase "beyond a reasonable doubt" more than a dozen times,[15] emphasizing that "a defendant is presumed to be innocent unless and until the government proves the defendant guilty to your satisfaction beyond a reasonable doubt." Cf., e.g., Mendoza-Acevedo, 950 F.2d at 4 (noting that use of "guilt or innocence" may be mitigated by "careful and clear discussion of the presumption of innocence and the government's burden of proof" elsewhere in charge). Although the misleading antithesis "guilt or innocence" certainly should be eschewed, in the context of the entire charge in this case it is highly probable that the jury ultimately understood that the earlier references to the term "innocence" were shorthand for "not guilty

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[15]As but one example, the court instructed: "And I want to emphasize it[,] in order for the government to prove a defendant guilty of any offense, it's got to convince you beyond a reasonable doubt that it is [sic] proven each and every element beyond a reasonable doubt. Possibilities or even probabilities are not sufficient. If the government fails to prove any one or more of the elements of an offense beyond a reasonable doubt, then you must find the defendant not guilty of that particular offense." (Emphasis added.) Cf. Mendoza-Acevedo, 950 F.2d at 4 (affirming instruction with same wording).

beyond a reasonable doubt." See Romero, 32 F.3d at 651.

2. The "Missing Witness" Instruction

Appellants challenge the refusal to allow their request for a "missing witness" instruction to the effect that the government's failure to call Robert Buehne and Paul Calenda as prosecution witnesses permitted the jury to infer that their testimony would have been unfavorable to the government.

We review district court rulings relating to "missing witness" instructions for abuse of discretion. United States v. Lewis, 40 F.3d 1325, 1336 (1st Cir. 1994). First, however, appellants were required to show that Calenda and Buehne were (1) "favorably disposed" to testify for the government by virtue of their status or relationship with the parties, or (2) "peculiarly available" to the government, such as being within the government's "exclusive control." United States v. Welch, 15 F.3d 1202, 1214 (1st Cir. 1993).

The cooperation rendered the government by Calenda and Buehne during the criminal investigation did not necessarily satisfy appellants' burden of proof. See United States v. Spinosa, 982 F.2d 620, 633 (1st Cir. 1992) (noting that "[t]here is no per se rule that [even] paid government informants are presumed to be so clearly favorably disposed to the government that they are not available to criminal defendants"). More to the point, Calenda invoked his Fifth Amendment right not to testify, thereby rendering himself "unavailable" to either side. See United States v. St. Michael's Credit Union, 880 F.2d 579, 598 (1st Cir. 1989).

Furthermore, it is probable that the testimony Buehne may have been able to provide would have been cumulative of that which his fellow informant and friend, Paula Coppola, offered. Welch, 15 F.3d at 1215 n.7 (1st Cir. 1993) (noting that district court need draw no adverse inference against government for not calling a witness when it presents a "plausible explanation," such as the likely cumulativeness of the missing testimony). Finally, and most importantly, appellants made no attempt to call either Calenda or Buehne at trial. Spinosa, 982 F.2d at 633 (noting that defendant who did not even try to subpoena missing witness was engaged in after-the-fact "gamesmanship," i.e., attempting to gain the belated benefit of an evidentiary inference adverse to the government without venturing any risk that the missing witness' testimony might have been unfavorable to the defendant). The district court did not abuse its discretion in refusing a "missing witness" instruction.

3. The "Missing Evidence" Instruction

The district court instructed the jury that it was to "focus on the evidence that has been presented and whether, in [its] judgment, that evidence does or does not establish the defendants' guilt beyond a reasonable doubt," and not "wonder[] about other things [viz., 'facts that were not presented . . . during the course of the trial']." Ouimette contends that the latter instruction improperly suggested that the jury need not concern itself with whether the government proved, beyond a reasonable doubt, the "missing" facts which

the defense deemed necessary to support Ouimette's conviction.

Viewed in the context of the entire charge, DeMasi, 40 F.3d at 1317, the "missing evidence" instruction did not amount to an abuse of discretion, Mitchell, 85 F.3d at 809.[16] Prior to delivering the instruction the court told the jury that its verdicts must be based on "the evidence or the lack of evidence" against each defendant. Moreover, after Ouimette objected, the court gave a supplemental instruction precisely targeting the present claim of error: "I didn't mean to imply [that] you couldn't consider whether the Government has failed to produced (sic) facts that are necessary to establish guilt beyond a reasonable doubt." Nothing more was required.

E. Sentencing

1. The "Physical Restraint" Enhancement

DeLuca Sr. challenges the two-level enhancement which the district court predicated on its finding that Calenda had been "physically restrained" by Gellerman at the Calenda factory. See United States Sentencing Guidelines Manual §§ 2E2.1(b)(3)(B); 1B1.1, comment. (n.1(i)).[17] First, DeLuca

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[16]Furthermore, the instruction set forth a perfectly valid proposition: the jury is not to base its verdict on speculation, i.e., matters not evidenced at trial.

[17]Sentencing guideline interpretations are reviewed de novo, see United States v. Joyce, 70 F.3d 679, 681 (1st Cir. 1995), while the related factual findings are reviewed for clear error,

argues that the enhancement does not apply, since extortion almost invariably involves physical restraint. Compare United States v. Mikalajunas, 936 F.2d 153, 156 (4th Cir. 1991) (vacating analogous § 3A1.3 "physical restraint" enhancement because "[e]very murder involves the ultimate restraint [and] [s]uch terminal restraint is simply an element of the crime of homicide").[18] Section 2E2.1(b)(3)(B) itself belies this contention, however, in that its specific mention of "physical restraint" as an element in determining the offense level for extortions necessarily implies that not every extortion requires resort to physical means or entails a physical restraint of its victim.

DeLuca Sr. further contends that the district court incorrectly decided that the term "physically restrained" encompassed the assault in which Gellerman struck and pushed Calenda, even though Calenda was never "tied, bound, or locked up." U.S.S.G. § 1B1.1, comment. (n.1(i)). The examples listed in the guideline definition of "physically restrained" are merely illustrative, however, not exhaustive. See id. ("'Physically restrained' means the forcible restraint of the victim such as by being tied, bound, or locked up.") (emphasis added); see also United States v. Rosario, 7 F.3d

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United States v. Legardia, 17 F.3d 496, 499 (1st Cir. 1994).

[18]Since Mikalajunas was decided under § 3A1.3, the analogous "physical enhancement" generically applicable to all guideline offenses, we intimate no position regarding its direct holding.

319, 320-21 (2d Cir. 1993). Finally, the district court supportably found that Gellerman pushed Calenda as he attempted to leave the hallway in which he was being assaulted and that Parenteau, throughout the encounter, stood at the hallway door barring egress by Calenda. Thus, these physical restrictions on Calenda's freedom of movement constituted "physical restraint" sufficient to satisfy section 2E2.1(b)(3)(B). See, e.g., United States v. Jones, 32 F.3d 1512, 1519 (11th Cir. 1994) (per curiam) (confining victims to unlocked room by force is "physical restraint").

2. The "Three Strikes" Provision: "Serious Violent Felony"

The "three strikes" provision mandates life imprisonment upon conviction for a "serious violent felony" under federal law following two or more prior convictions for "serious violent felonies" in either federal or state court. A "serious violent felony" includes a federal offense "consisting of . . . extortion," id. § 3559(c)(2)(F) (emphasis added), defined as "an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person," id. § 3559(c)(2)(C) (emphasis added). On the other hand, the offense of which Ouimette stands convicted defines "extortionate means" to include not only the threatened or actual use of violence against the victim, but the victim's property as well. Id. § 891(7).

Ouimette contends that collecting extensions of credit

by extortionate means, 18 U.S.C. § 894, is not a "serious violent felony" within the contemplation of the so-called "three strikes" provision, id. § 3559(c)(1)(A). We review challenged interpretations of sections 3559(c) and 894 de novo. See United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997), cert. denied, 66 U.S.L.W. 3473 (U.S., Jan. 20, 1998) (No. 97-7126).

The Supreme Court has held that under the Career Criminals Amendment Act, 18 U.S.C. § 924(e) — an anti-recidivist statute couched in language comparable to 18 U.S.C. § 3559(c), see Taylor v. United States, 495 U.S. 575, 600-01 (1990) — the term "burglary" necessitates that the sentencing court determine whether the conduct proscribed by the particular statute of conviction fits the generic (albeit implicit) definition of "burglary" in section 924(e). Where the statute of conviction encompasses some conduct within the generic definition, but other conduct falls outside the generic definition, the sentencing court may consult the pertinent indictment and jury instructions (if available) to ascertain whether the conviction necessarily was based on conduct falling within the generic definition of "burglary" found in section 924(e).

The extortion at issue requires no recourse to a record of prior conviction, but simply to the record on appeal. The indictment and jury instructions leave no doubt whatsoever that Ouimette was convicted of violent physical assaults against Calenda and Duxbury, thereby readily meeting the

definition of "extortion" in subsection 3559(c)(2)(C) of the "three strikes" provision.[19]

F. The Motion for New Trial

Finally, Ouimette challenges the denial of his motion for new trial.[20] The "new" evidence he relied upon consisted of affidavits from Paul Parenteau and Harold Drew, attesting that Ouimette did not order Gellerman to assault Calenda or Duxbury, but instead urged Gellerman to "lay off" Calenda. Thus, these affidavits directly contradicted the testimony Gellerman gave at trial.

A new trial should not be allowed based on newly discovered evidence unless the defendant "establishes that the

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[19]Ouimette argues also that the "three strikes" provision contravenes the Eighth Amendment right to be free from cruel and unusual punishment. Rulings on the constitutionality of a statute are reviewed de novo. United States v. DiSanto, 86 F.3d 1238, 1244 (1st Cir. 1996), cert. denied, 117 S. Ct. 1109 (1997). Given Ouimette's lengthy history of violent criminal activity, the "three strikes" sentence cannot be considered grossly disproportionate. See, e.g., United States v. Washington, 109 F.3d 335, 338 (7th Cir.) ("The cruel and unusual punishments clause of the eighth amendment permits life imprisonment for a single drug crime, [so that] [l]ife for a repeat bank robber whose record includes murder and attempted murder is an easy case.") (citing Harmelin v. Michigan, 501 U.S. 957 (1991)), cert. denied, 118 S. Ct. 134 (1997).

[20]We review only for manifest abuse of discretion. United States v. Tibolt, 72 F.3d 965, 972 (1st Cir. 1995), cert. denied, 116 U.S. 2254 (1996).

evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial." United States v. Tibolt, 72 F.3d 965, 971 (1st Cir. 1995), cert. denied, 116 U.S. 2554 (1996).

The district court found that the evidence proffered in the Parenteau and Drew affidavits would have been available at trial but for a lack of due diligence. DeLuca, 945 F. Supp. at 413-14. Ouimette complains that he was unfairly surprised by Gellerman's perjurious description of the conversations in which Parenteau and Drew participated, and did not have enough time to locate these witnesses before the trial ended.

Quite the contrary, since Ouimette participated in these conversations he must have known long before trial that the "exculpatory" testimony these witnesses could provide would be essential to respond to the evidence against him, whether or not Gellerman were to testify. See United States v. Slade, 980 F.2d 27, 29-30 (1st Cir. 1992) (noting that defendant's own conversations rarely qualify as "newly discovered" evidence).

Furthermore, one week after pleading guilty Gellerman testified to these very conversations, leaving Ouimette seven days to locate Parenteau and Drew. At no time did Ouimette request a continuance to enable a search for either Parenteau or Drew, or invoke compulsory process to secure their appearance. See United States v. Levy-Cordero, 67 F.3d 1002, 1018 (1st Cir. 1995). As Ouimette

failed to make the required four-part showing, Tibolt, 72 F.3d at 971, the district court did not abuse its discretion in denying a new trial, id. at 972.[21]

Affirmed.

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[21]Although appellants raise numerous other challenges to their convictions and sentences, none merits discussion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1173

UNITED STATES,
Appellee,

v.

ROBERT P. DELUCA, SR.,
Defendant, Appellant.

No. 96-1221

UNITED STATES,
Appellee,

v.

GERARD T. OUIMETTE,
Defendant, Appellant.

No. 96-1353

UNITED STATES,
Appellee,

v.

KENNETH RAPOSA,
Defendant, Appellant.

No. 96-2231

UNITED STATES,
Appellee,

v.

GERARD T. OUIMETTE,
Defendant, Appellant.

ORDER OF COURT
Entered: May 9, 1997

In order to facilitate reliable appellate consideration of the Sixth Amendment claim raised by appellants DeLuca and Ouimette in the captioned proceedings, the court retains appellate jurisdiction and hereby remands to the district court for findings as to the factual bases for its order dismissing defendants-appellants' objections to the security procedures, instituted by the United States Marshals Service, for screening would-be trial attendees. *See Waller v. Georgia*,

467 U.S. 39 (1984). The district court findings shall be submitted in writing to the Clerk of the Court of Appeals by July 9, 1997. The court may, if it deems it necessary to do so, conduct evidentiary hearings before responding.

By the Court:

WILLIAM H. NG, CLERK.

By /s/Janice M. O'Neil

Chief Deputy Clerk.

[Certified COPY to Honorable Ernest Torres and Clerk, USDC of RI,

cc: Messrs: Cardinale, Leavey, Ouimette, Egbert, Robbio, Ms. Rapport and Ms.Curran]

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Appellee,

v.

GERARD T. OUIMETTE,
Defendant, Appellant.

Before
Torruella, Chief Judge
Coffin and Cyr, Senior Circuit Judges,
Selya, Boudin, Stahl and Lynch, Circuit Judges.

ORDER OF COURT

Entered: April 14, 1998

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court:

Phoebe Morse, Clerk.
By /s/Janice M. O'Neil
Chief Deputy Clerk.

[cc: Mr. Mitchell, Ms. Rapport and Ms. Curran]

May 8, 1997

William H. Ng, Clerk
United States Court of Appeals
For the First Circuit
1606 John W. McCormack
Post Office and Courthouse
Boston, MA 02109

Re: Gerard T. Ouimette and Robert P. Deluca
Appeal Nos. 96-2231 and 96-1173

Dear Mr. Ng:

This case was argued on Monday, May 5, 1997 before Judges Selya, Cyr, and Coffin. The panel had a number of questions regarding the Sixth Amendment Public Trial issue raised by the Defendants and suggested that it might be appropriate to send the matter back to the District Court for a hearing.

One of the areas of particular concern to the panel was whether the marshals or other federal agents who were requiring persons entering the courtroom to show identification were also maintaining a written list of the names of persons who entered. I represented at argument that the record did not establish whether in fact such a list was maintained.

I have been informed by members of the United States Attorneys Office staff who were spectators at the trial that a list was indeed maintained. Because this fact has direct bearing on the panel's consideration of this matter, please convey this information to the panel as soon as possible. I do not know at this time whether the list is still in existence.

Thank you for your assistance in this matter.

Very truly yours,

SHELDON WHITEHOUSE
U.S. Attorney
/s/Margaret E. Curran
MARGARET E. CURRAN
Assistant U.S. Attorney
U. S. Department of Justice
United States Attorney
District of Rhode Island

MEC:slg
cc: Sara Rapport, Esquire
Anthony H. Cardinale, Esquire

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 95-029-T

ROBERT P. DELUCA, SR.
and GERARD T. OUIMETTE

FINDINGS AND REASONS

Pursuant to the limited remand order of the Court of Appeals dated May 9, 1997, I hereby submit the following statement of the information, observations, findings, conclusions and reasons upon which I based my denial of the defendants' motion to direct the United States marshals to cease seeking identification from spectators entering the courtroom during trial:

1. The procedure, in question, did not deprive the defendants of their right to a public trial.

2. At no time, either before or after the defendants' motion, was the courtroom closed to spectators or the public.

3. The only alleged restriction on admittance to the courtroom was that members of the public provide identification before being allowed to enter.

4. Even if providing identification was, in fact, a precondition for entering the courtroom, it did not constitute a closure of the courtroom or an exclusion of the public.

5. The burden that any such requirement imposes on spectators desiring to attend a criminal trial is minimal.

6. Such burden is no more onerous than the burdens imposed by other security procedures with which individuals entering courthouses and other public buildings often must comply, including:

(a) the requirement that individuals entering airports and courthouses, including this courthouse, must pass through metal detectors and, when appropriate, empty their pockets and consent to be searched; and/or,

(b) the requirement that identification be produced by individuals entering other public buildings with which I am familiar, such as the headquarters of the Administrative Office of United States Courts and the Federal Judicial Center.

7. The procedure of seeking identification from spectators, in fact, did not have any discernible effect on attendance by "the public" either in this case or in any previous "high security" trials over which I have presided where similar procedures were utilized.

8. In this case, before the defendants' motion was made, I had observed the gallery to be filled or nearly filled at all times and I further observed that the spectators included individuals that I knew to be representatives of the media and members of the bar as well as relatives of the defendants and persons in the company of those relatives. Although events

occurring after the defendants' motion was denied did not form the basis for denial, it should be noted that I observed such attendance to continue for the duration of the trial.

9. Any impact that requesting or requiring spectators to identify themselves may have had on attendance by the "public" was outweighed by what, in my judgement, was the need to maintain courtroom security and the need to minimize the risk that attempts might be made to influence jurors.

10. The bases for that judgement, many of which were cited as reasons for granting the motion for an anonymous jury, were as follows:

(a) The previously presented affidavit of FBI agent Richard Cleary stating that, during a 1982 criminal trial in which Gerard Ouimette was a defendant, Rhode Island state police stopped a car occupied by three convicted felons and found, among other things, a loaded firearm, handcuffs, a baseball bat, a metal pipe, an apparently bloodstained screwdriver and a list of the jurors selected for that trial. See, attached Ex. A.

(b) The previously presented affidavit of FBI agent Alan T. Robillard stating that shortly before this trial began, Paul A. Calenda, in consultation with defendant DeLuca's nephew, had attempted to induce Paula Coppola, an important government witness, to testify in a manner more favorable to Mr. DeLuca.

See attached Ex. B.

(c) The fact that Mr. Calenda was a victim of the alleged extortion in this case and that, prior to the alleged attempt to influence Ms. Coppola's testimony, he had allowed the FBI to video tape a conversation between him and defendant Ouimette for the purpose of gathering evidence of the defendants' efforts to extort him.

(d) The previous and uncontroverted representation by the government that, at the time of trial, defendant DeLuca was under indictment in the District of Massachusetts for a RICO conspiracy and that, in the indictment, the Grand Jury charged that Mr. DeLuca was a member of an organized crime family.

(e) The previous and uncontroverted representation by the government that defendant Ouimette had prior convictions for robbery, assault with a dangerous weapon and conspiracy to murder and that defendant DeLuca had prior convictions for extortion and assault with a dangerous weapon.

(f) The fact that, if convicted, by both defendants faced potential sentences of life in prison without the possibility of parole.

(g) The concern that, although individuals entering the courthouse are required to pass through a metal detector and are subject to being searched, the

layout of the building creates a real risk that individuals could acquire weapons after entering the building and bring them into the courtroom undetected.

11. In my judgment, requiring spectators to identify themselves served the purposes of preserving courtroom security and minimizing the risk of jury tampering in a number of ways, including:

(a) Deterring spectators who may have been able to identify jurors from attempting to influence and/or from aiding others who might attempt to influence those jurors inasmuch as those spectators would be aware that their presence in the courtroom was known.

(b) Enabling marshals to determine whether any spectators were known to be security risks and; therefore, should be searched and/or subjected to closer surveillance than other spectators.

/s/ Ernest C. Torres
Ernest C. Torres
United States District Judge
Date: June /s/ 12, 1997

EXHIBIT A

AFFIDAVIT

Richard Cleary, being duly sworn and under oath states:

1. I am a Special Agent, Federal Bureau of Investigation, Providence, Rhode Island.

2. Based on my review of a November 5, 1987, Affidavit of Detective Sergeant John E. Turner, Rhode Island State Police trooper, I am aware of the following:

(a) On or about November 5, 1982, Rhode Island State Police trooper Daniel J. Morrison, while on traffic detail on Interstate Route 95 in Richmond, Rhode Island, stopped a 1983 4-door Chevrolet sedan bearing Massachusetts plate 719-IFC, for speeding;

(b) The driver of the vehicle was identified as Ronald Thornlay; the passengers were identified as Rickie A. Cochran and James J. Tiernan;

(c) Additional troopers subsequently arrived at the scene of the stop. Thornley and Cochran were recognized as individuals having extensive and serious criminal records;

(d) In plain view of the front seat of the vehicle were stocking hats, gloves, and nylon stockings;

(e) A subsequent search of the vehicle disclosed the following items in the glove box: One .38 special, 5-shot Charter Arms revolver (loaded, Serial NO. 50705), One pair of stainless steel handcuffs, a juror list

pertaining to United States District Court;

(f) A search of the trunk of the vehicle disclosed a plastic bag containing numerous articles of clothing, including one pair of tan trousers with apparent staining; another bag containing rubber surgical type gloves; a dent puller; screwdriver; baseball bat; a metal pipe; and a Pennsylvania registration plate no 156-J01.

3. On November 6, 1982, I viewed some of the items found in the search of this vehicle. I have had approximately 15 years of law enforcement investigative experience, and the staining on the above-referenced trousers appear to be blood stains, and that I observed apparent blood stains on the above-referenced screwdriver.

4. Edwin J. Gale, Special Attorney, U.S. Department of Justice, Providence, Rhode Island, the prosecutor assigned to the criminal case United States v. Gerard T. Quimette (U. S. District Court, Rhode Island, CR. No. 82-63B), advises that he has viewed the juror list seized from the vehicle driven by Thornley and that said list is identical to the list relating to the said Quimette case, and that the seized list apparently identifies the 24 petit and alternate jurors ultimately selected for the Quimette trial.

5. Charter Arms, the manufacturer of the firearms found in said vehicle, has its manufacturing facilities in the State of Connecticut; charter Arms has no manufacturing facilities in the State of Rhode Island.

6. On or about February 2, 1982, Thornley was

convicted of 18 U.S.C. §§2313,2, and was sentenced to a 5 year prison term.

7. On or about October 16, 1973 Tiernan was sentenced to an 18-month prison term at the Rhode Island Adult Correctional Institution ("ACI") relating to Rhode Island state felony conviction of breaking and entering in the nighttime.

8. Cochran has served several years at the ACI on Rhode Island state felony convictions relating to homicide and assault with a dangerous weapon.

/s/Richard Cleary
RICHARD CLEARY
Special Agent
Federal Bureau of Investigation

Sworn to and subscribed before me this /s/ 8th day of November, 1992.

/s/Jacob Hagopian
JACOB HAGOPIAN
United States Magistrate

EXHIBIT B

AFFIDAVIT

I, ALAN T. ROBILLARD, being duly sworn deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, and have been so employed for the past nineteen years. I am presently assigned to the Providence, Rhode Island office.

2. This affidavit is submitted in support of an application for an arrest warrant for Paul A. Calenda, (Calenda), DOB 9/25/50, charging him for the violation of 18 U.S.C. § 1512 and 2, i.e. tampering with a witness.

3. On June 16, 1995 a federal grand jury in this district indicted Robert F. Deluca, Sr., Gerard T. Ouimette, and others on a number of charges including conspiracy to extort money from Paul A. Calenda. Witnesses against them include Calenda, Paula Coppola(Coppola) and Robert Buehne (Buehne). All three witnesses testified in the federal grand jury sitting in this district.

4. Buehne and Coppola were placed in the Witness Protection Program run by the U.S. Marshal Service. Calenda decided not to enter into that same program.

5. I have reviewed the grand jury testimony of Coppola regarding Deluca, Sr. In substance, Coppola testified that in December 1994, Deluca, Sr. came to her home, discussed loanshark debts owed to him and told Coppola that Calenda owed $125,000 and he was going to get

the money off him. On or about January 6, 1995 Ouimette told Coppola that Calenda owed Deluca, Sr. $125,000 and, if Calenda didn't pay, he, Ouimette, was going to break Calenda's legs.

6. On September 19, 1995, as a result of previous telephone conversations, Calenda stated to Buehne that he had Deluca, Sr.'s nephew, Frank, on the phone and Calenda proceeded to relay questions from Buehne to Frank. This and other recorded conversations were recorded with the consent of Buehne and Coppola.

RB: Frank's on the other line? Pause. Come on what the f___. Yeah.

PC: Ok, sorry. In other words he asked me if you want me to talk to his lawyer and U/I said no. I thrust the lawyer though. I will be hones with you. Frank called him, you know, because I sat down with him a couple of times U/I . . . He would keep it U/I. . . but anyways. In other words, in other words, put it this way, ok, you know, like Pa--in other words, Paula wouldn't be -- in other words, yeah, alright she'll be lying, okay. In other words, she would say like, in other words, is what happened was, you know, she was upset with Bobby and Bobby never acknowledged her when she was married -- okay -- to Ronnie. When Ronnie passed away. He's not telling

me to tell her to say this. I mean, in other words, why is Paula's story different then when she went in front of the grand jury. You know what I mean.

RB: Right.

PC: U/I. . . on the other line. Do you want me to ask him anything else?

RB: So he's saying that that's what she's going to do. She's gotta sink all her U/I. . . .

Calenda then state Frank didn't want Paula to lie because his uncle, Robert Deluca, Sr.'s defense was that he never said what Coppola said he said. Buehne responded that Frank knew that his uncle had been shaking people down for 50 years to which Calenda stated that Frank didn't want Coppola to lie but Calenda acknowledged that he knew she would be lying if she testified to what Frank wanted her to:

RB: He doesn't want her to lie.

PC: But but U/I would be lying, you know, right.

RB: You know it and I know it.

PC: Yeah I know that.

Calenda then relayed a question from Buehne as to how Coppola would not be prosecuted for perjury if she lied at the upcoming trial. Buehne then asked Calenda to ask Frank how Coppola and Buehne could be assured that they would not be prosecuted for perjury if they said what Deluca wanted them to say.

Furthermore, Buehne wanted an assurance that Deluca, Sr.

and Gerard Ouimette (Ouimette) would not seek revenge if Coppola and Buehne testified to what he wanted them to. Calenda responded the Buehne and Coppola had nothing to fear from Deluca, Sr. Calenda responded that Frank told Calenda to have Calenda talk to a named individual who would help Buehne out.

Two days later, in another conversation Calenda expressed the opinion that he thought Buehne was getting "cold feet" when he failed to call the day before.

I am advised by Assistant U.S. Attorney, James H. Leavey that he has spoken on several occasions with both Calenda and Buehne and he recognizes both voices on the aforementioned tape recording to be as stated.

Wherefore I submit that there is probable cause to believe that Paul A. Calenda has attempted to corruptly persuade a person or persons with intent to influence the testimony of those person(s) in an official proceeding, i.e. trial U.S. v. Deluca, et al, CR No. 95-029T, in violation of 18 U.S.C. § 1512 AND 2.

/s/Alan T. Robillard
ALAN T. ROBILLARD
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this /s/27th day of September, 1995, at Providence Rhode Island.

/s/
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 95-029-T

GIRARD T. OUIMETTE and
ROBERT P. DELUCA, SR.

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

Supplemental Findings of Fact

The Court makes the following supplemental findings of fact based upon evidence presented at the remand hearing conducted on June 16, 1997. It should be noted that the paragraphs denoted by asterisks were not the subject of testimony but are based on the trial judge's personal knowledge and are included for the purpose of providing additional facts that may be helpful to the Court of Appeals.

1. Prior to trial, the marshal met with the trial judge for the purpose of explaining the security precautions he planned to take during the trial.

2. During that meeting the marshal disclosed that he planned to require spectators entering the courtroom to

produce identification.

3. The marshal did not tell the trial judge that he intended to record the identities of spectators or that the information obtained might be used to determine if a particular spectator had a criminal history.

4. However, the trial judge was aware that a similar procedure had been utilized in at least one previous "high security" trial with his permission.*

5. The trial judge did not object to the proposed procedure because he believed that circumstances warranted it.*

6. The identification procedure was devised by the marshals pursuant to their understanding of provisions in the Manual for United States Marshals directing that they "screen spectators. . .as circumstances require."

7. The manual does not describe the procedure to be used in "screening" spectators.

8. The manual sets forth criteria for determining the level of security risk associated with various kinds of trials.

9. According to those criteria, this trial was classified as a "high risk" trial because it involved organized crime figures, protected witnesses, defendants with violent histories and/or multiple defendants.

10. During the trial, a small desk was placed near the spectator entrance to the courtroom and was staffed, at all times, by a marshal.

11. All spectators except those known to the marshals were required to produce photo identification as a condition of entry into the courtroom.

12. Most spectators also were asked to furnish their dates of birth.

13. Spectators were not asked why they were there, nor were they required to provide any other information about themselves.

14. Nõ one who produced identification was denied admittance.

15. The names and, in most cases, the nature of the identification produced (e.g., RI driver's license) were recorded so that marshals would be able to determine who was in the courtroom each day.

16. Dates of birth also were noted so that marshals, in their discretion, could check to determine whether a particular spectator had a criminal history.

17. Any criminal histories that were obtained were obtained by marshals themselves.

18. Any criminal histories that were obtained would have been obtained after the spectators, in question, were admitted into the courtroom and, usually, not even the same day.

19. No records were kept that would reflect what criminal histories were obtained and the histories, themselves, have not been retained.

20. All information recorded by the marshals was kept in a file maintained by the deputy marshal in charge of security for the trial.

21. Neither the records kept by the marshals nor any information contained in those records ever was circulated to the FBI or any other law enforcement agency.

22. The courthouse in which the trial was, conducted has four doors affording entry at street level which are located at the front, rear and on each side of the building,

respectively.

23. There also is a fifth street level door on the side of the building and a door leading from the first floor corridor to the basement.*

24. The public is permitted to enter the building through thef ront door only.

25. Court employees are allowed to enter through the rear door.

26. The side doors are kept locked at all times.

27. The side doors are equipped with panic bars that permit them to be opened from the inside without a key.*

28. The side doors are connected to an alarm that is active at all times and, when operational, sounds throughout the building when the doors are opened.

29. There are security posts at the front and rear entrances that are staffed by court security officers.

30. One of the side doors is clearly visible from the front security post. Another side door and the door to the basement are near but not directly visible from the rear

security post. The remaining side door is some distance from and not visible from the two security posts but is monitored from those posts by a security camera.*

31. The front post has an x-ray machine that is used to examine packages and a magnetometer that senses the presence of metallic objects.

32. Persons entering the building must pass through the magnetometer and empty their pockets in order to identify metallic objects they may be carrying.

33. Persons entering the building also are subject to being searched for weapons at the discretion of the marshals.

34. The rear post has a magnetometer but no x-ray machine.

35. At the time of trial, there were no security cameras monitoring the front or rear entrances..

36. At the time of trial, none of the security cameras in the building had any videotaping capacity.

37. The courtroom in which the trial was conducted is located on the second floor.*

38. There are public bathrooms on first floor.

39. At the time of trial, the building was not staffed by security officers at night or on weekends.*

40. At the time of trial, a number of court employees, employees of other federal agencies located in the building and cleaning crews under contract with the General Services Administration had access to the building at night and on weekends.*

41. The jury room is directly across the corridor from the entrance to the courtroom.*

42. The marshals had the capability to place a magnetometer at the entrance to the courtroom for the purpose of detecting metallic objects on the persons of spectators entering the courtroom and, in fact, had done so during some previous trials in the building.

43. The marshals purposes in requiring identification of spectators and recording the information received were:

a. to know who was in the courtroom each day,

b. to assist them in identifying persons who might have been known to them from their experience

in law enforcement; and,

c. to enable them to run criminal history checks on particular spectators, presumably for the purpose of determining whether those spectators presented a security risk.

44 The information obtained did not serve the purpose set forth in paragraph 43(c) because criminal history checks were not made before admission to the courtroom and, generally, were not even made on the same day.

45. The courtroom in which the trial was conducted has four rows of benches in the spectator gallery that accommodate approximately forty spectators depending upon how closely together they sit and how many seats are occupied by marshals and/or court security off icers.

46. A portion of the first row that seats 3-4 persons is in such close proximity to the jury box that there is a standing order by the Court that spectators not be allowed to occupy those seats.*

47. On the day following the first day of trial, the PROVIDENCE JOURNAL, a newspaper of general circulation in the state of Rhode Island, reported the fact that marshals were recording "names and drivers, license numbers" of spectators and attributed to a marshal the

statement that "it's good intelligence."

48. According to the marshals, records (Ex. B), the number of persons who attended the trial and were required to provide identification ranged from a low of 8 during the afternoon session on October 16 to a high of 39 during the morning of October 19 and an average of approximately 26 persons attended each session.

49. Those attending the trial included at least seven relatives of defendant DeLuca, four relatives of defendant Ouimette and two persons identified as friends of Mr. DeLuca.

50. Virginia Cinquegrana, Mr. DeLuca's sister, attended every day of the trial.

51. On the third day of trial, she was denied admittance because she could not produce identification but was admitted later that day after she went home and returned with her driver's license.

52. At some time during the trial, Antonio Lanni sought to attend the trial but was denied admittance because he was unable to produce identification.

53. On the day that the verdict was delivered, Mr.

Lanni returned with identification and was admitted.

54. There is no indication that any other spectator was turned away for failure to produce identification.

55. William Carcieri, a long-time friend of Robert DeLuca, attended the fourth day of trial on Wednesday, October 18,1995, at which time he learned that identification was required to enter the courtroom.

56. Although Mr. Carcieri had planned to attend additional sessions, "as time would permit," he decided not return because he was indignant at what he felt was "an invasion of privacy to give my name."

57. Sometime after making that decision, Mr. Carcieri was told by a friend that the information obtained by marshals was being used for "intelligence purposes."

58. Anthony Laurenza, a costume jewelry manufacturer and long-time friend of the DeLuca family, "planned" to attend the trial but decided not to because of concern that his name would get into the newspaper and that one of his competitors might tell the Woolworth Corporation, one of his best customers, that he had attended.

59. That concern was prompted, in part, by

knowledge that spectators were required to produce identification and by the apparent belief that such information would be made available to the media.

60. There is no credible evidence that the identification requirement deterred any other person from attending the trial.

61. Robert Travis, testimony that he intended to attend the trial but did not do so because felt uncomfortable upon learning that marshals were asking for identification was not credible because:

a. Mr. Travis did not give the appearance of being a candid witness.

b. Mr. Travis, denial that he had spoken with Mr. Cardinale prior to the morning on which he testified was inconsistent with John Notarianni's testimony that, the week before, Mr. Travis and Mr. Cardinale attended a meeting at which time the trial and the upcoming June 16 hearing were discussed.

c. Mr. Travis' testimony that no one asked him to testify at the hearing, that he came on his own and that he did not tell anyone he was coming until he arrived at the courthouse at 10:30 a.m. on the day of the

hearing was implausible.

d. Mr. Travis did not attend the f irst day of trial even though he acknowledged knowing about it in advance and even though he did not learn of the identification requirement until later.

e. Mr. Travis testified that the reason he felt "uncomfortable" about producing identification was that he was planning to open a mortgage company with Rocco DeLuca, Jr. , and did not want any "headaches" in obtaining a state license. However, Mr. Travis' statement that he was only an employee of that business and that Mr. DeLuca, Jr., was his employer makes it unlikely that he could have been concerned that his mere presence at the trial would adversely affect any license application especially since Mr. DeLuca, Jr., is the defendant's nephew and, himself, attended two days of the trial.

62. John Notarianni's testimony that he planned to attend the trial but did not do because he was "afraid of the publicity" and had "heard that they were accepting a list or licenses at the door" was not credible because:

a. Mr. Notarianni's demeanor on the witness stand created serious doubts about the truthfulness of

his testimony.

b. Mr. Notarianni's claim that he was concerned about having it known that he attended the trial because he "dealt with a lot of people at [his] restaurant" was implausible in light of his acknowledgment that defendant DeLuca was a regular customer at that restaurant.

c. Mr. Notarianni did not attend the first day of trial and stated that he made his decision on "the first day" when he was told by Rocco DeLuca that identification was being checked. He further stated that his decision was "reinforced the next day," apparently by the published report of the first day's events. However, it is difficult to see how Mr. Notarianni or Mr. DeLuca could have known of the identification requirement until after the first day of trial.

63. It is unlikely that William A. Carcieri would have attended the trial even if spectators were not required to identify themselves because:

a. While the trial was in progress, he was a state employee and worked from 7:00 a.m. to 3:30 p.m. on Monday through Friday.

b. Mr. Carcieri first learned of the "carding process" after his father attended the fourth day of trial but he did not attend prior to that time.

64. The requirement that spectators identify themselves was not a significant factor in Melissa Babcock's decision not to attend the trial because:

a. She had "children at home" and had difficulty arranging to be present.

b. She testified that she was afraid to attend because of the "publicity" surrounding the trial and that, even before she learned of the identification requirement (i.e., after the trial had been going on for some days) , she did not come because, "There was media there. There was publicity."

c. The fact that she is defendant DeLuca's niece strongly suggests that concern about being "stigmatized" or "labeled" was not a significant factor in her decision not to attend the trial.

Supplemental Conclusions

After considering both the facts known to the Court on October 16, 1996, as set forth in the Court's "Findings and

Reasons" dated June 12, 1997, and the evidence presented at the June 16, 1997, remand hearing, the Court hereby finds and concludes as follows:

1. The requirement that spectators produce identification did not amount to a closure or a partial closure of the courtroom because:

a. The identification procedure was neither arduous nor difficult to satisfy.

b. No one producing identification was excluded from the courtroom.

c. No significant segment of the public was deterred from attending the trial because of the identification requirement.

d. In fact, the trial was well attended by the public.

See, *United States v. Brazel*, 102 F.3d 1120, 1154-55 (11th Cir. 1997).

2. The defendants, Sixth Amendment rights were not otherwise abridged because regular attendance by representatives of the media as well as by relatives and

friends of both defendants further ensured fair treatment of defendants which is the purpose underlying the guarantee of a public trial.

3. Any tendency that the identification requirement, per se, may have had to deter attendance by the public was minimal because:

a. The identification procedure was not burdensome.

b. The identification procedure was no more intrusive than other security procedures to which spectators were necessarily subject (e.g., having their packages x-rayed, passing through metal detectors and agreeing to be searched upon request).

4. Any genuine concerns that potential spectators may have had about their presence being recorded resulted from an apparent misconception that such records were accessible to the media and/or would be disseminated to other law enforcement agencies. Moreover, the principal source of that misconception was not the identification requirement, itself; but rather, it was the publication of an ill-considered comment attributed to a marshal that the information was being gathered for "intelligence purposes."

5. Any deterrent effect that the photo identification requirement may have had on attendance was outweighed by substantial security concerns regarding the need to maintain courtroom security and the need to discourage any attempt to influence jurors which concerns arose from the facts set forth in subparagraphs 10 (a) - (h) of the Court's "Findings and Reasons" dated June 12, 1997.

6. The identification procedure utilized addressed those needs in the following ways:

a. Requiring identification assisted marshals in identifying persons known to them from their collective experience in law enforcement who posed potential security risks.

b. Maintaining a record of those present during the trial served to deter spectators who may have been able to identify jurors from attempting to influence and/or from aiding others who might attempt to influence those jurors.

7. Although obtaining birth dates could have served a substantial courtroom security need by permitting marshals to check the criminal histories of spectators arousing their suspicions, in fact, it did not serve that need because such checks were not made at or near the time that spectators

were admitted into the courtroom. However, there is no evidence or reason to believe that obtaining that information had any deterrent effect on attendance independent of whatever deterrent effect may have resulted from the photo identification requirement.

8. Even if the identification procedure is viewed as a "partial closure," no less restrictive alternatives were identified that adequately would have served the substantial security needs in question.

9. The suggested alternative of placing a magnetometer at the entrance to the courtroom would have helped to prevent spectators from bringing in metallic objects that may have been obtained after entering the building but it would not have assisted in identifying spectators who were potential security risks nor would it have permitted marshals to maintain a list of persons present at the trial for the purpose of deterring any attempts to identify and/or influence jurors.

For all of the foregoing reasons, the Court hereby re-affirms its denial of the defendants' motion.

/s/Ernest C. Torres
Ernest C. Torres
United States District Judge
Date: July /s/8 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

**********	CRIMINAL ACTION
UNITED STATES OF AMERICA	*NO. 95-0029T
Plaintiff	*
vs.	*MONDAY,
GERARD OUIMETTE (1) and	*OCTOBER 16, 1995
ROBERT DeLUCA, SR. (4)	*
Defendants	*
**********	Providence, RI

HEARD BEFORE THE HONORABLE
ERNEST C. TORRES
DISTRICT JUDGE
(DAY II)

A-P-P-E-A-R-A-N-C-E:

For A Government: James Leavey, Esquire
Assistant U.S. Attorney
and
Kenneth Madden, Esquire
Assistant U.S. Attorney

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and
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(For: Ouimette)

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and
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(For: DeLuca, Sr.)

Court Reporter: Judith L. Montie
215 Federal Building
Providence, RI 02903

Proceeding reported by computer-aided
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MR. EGBERT: I think it's appropriate that whatever you receive from the Government would be part of the record.

THE COURT: Okay.

All right. The Court will ask the Clerk to seal this package of material that was furnished to the Court by the Government in this case.

What was your other point, Mr. Egbert?

MR. EGBERT: Your Honor, the other point

relates to the manner in which the public is being dealt with in this trial. It's -- there are security officers or marshals --

THE COURT: Is this something that needs to be taken up right now Mr. Egbert, or can we do this at the morning recess?

MR. EGBERT: I think it should be taken up now. Let me put it on the record anyway and we can deal with it when you wish to. I think the members of the public who wish to observe this trial are being caused to identify themselves and provide identification before they are allowed entry into this Courtroom. I suggest to do that is contrary to the constitution's directive of a public trial without any form of restriction. And I object to it being done on behalf of Mr Ouimette and I object to any process which intimidates or inhibits in any way the public's right of access to this Courtroom.

So for those reasons, I ask you order that it stop.

THE COURT: We'll take that up at the morning recess. I don't think it is something that needs to be addressed now. I will give you an opportunity then to respond, Mr. Leavey.

Would you bring the Jury in, please.

(JURY PRESENT AT 10:09)

THE COURT: Good morning, Ladies and Gentlemen.

ALL: Good morning.

THE COURT: Again, I must ask you and please forgive me for repeating this question. I have told you it is very important. Have any of you read or heard anything about this

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Q He didn't look unusual to you in any way?

A No, sir.

Q And that was on March 1st, 1995, at, approximately, ten-thirty at night?

A Yes, sir.

MR. EGBERT: Your Honor, I have no further questions subject to reviewing these documents which I haven't been able to read through.

THE COURT: All right. We will take our morning recess now and then after the recess, if you have any redirect, Mr. Madden, you can redirect and then if Mr -- well, first we'll see if Mr. Egbert has any further cross and then you can redirect.

Members of the Jury may return to the Jury room for your morning recess.

(JURY OUT AT 11:08 A.M.)

THE COURT: You may step down,

Agent Suddes.

(WITNESS COMPLIES)

THE COURT: All right. Mr. Leavey, is there anything you would like to say with respect to Mr. Egbert's request that the security officers be prohibited from seeking identification from persons entering the Courtroom?

MR. LEAVEY: Yes, Your Honor. I don't believe that, certainly, it's the Government's position that that is a security question that should be left to the marshals. Obviously, the Court has to make the final decision but their expertise in what is necessary for the security, I think should be given a great deference in his particular case without going into all of the ramifications. The Government feels that the security setup by the marshal is very appropriate. I don't think there is certainly anything unconstitutional about a Court, basically, protecting the security of everyone in the Courtroom. As far as I know, nobody is being prohibited from coming and going and the marshals apparently felt that is necessary for the security.

MR. EGBERT: One, I think if there is some security basis for it, the Court ought to have some hearing to determine what it is, not just on Mr. Leavey's say-so.

Number two. it's my understanding that if people do not desire to show identification and going on the list of people with the identification, they are turned away. The marshals are maintaining a written list of the people that

come to the Court, their names and whatever identification they show in that regard. And that I think is the factual predicate of what's going on.

I disagree with Mr. Leavey. The marshals have taken all kinds of measures. There's metal detectors downstairs. There's search, they have full authority to search per order of this Court any person entering the Courtroom which they exercise to their full ability and the identity of the person that comes and wants to watch this trial should not have to go on some Government list. This is not 1954 and those who wish to come and show their support for any one should remain anonymous in this country and the Courtroom should remain anonymous without going on some Government list.

MR. CARDINALE: Judge, my concerns are whether or not the Jury, whatever the Jury might see coming in and out of the Court. In other words, if there is a book open with lists of names and numbers and all that stuff, what impressions that gives the Jury is my main concern; although, I share my brother's concerns as well. I can just say based on experience in cases which I think have a lot more security questions including the case United States versus Gotti. The marshals never did anything like that. Just the door was open. Someone could come in. If there was some disturbance that took place, then certainly they have a right to investigate but coming into the Court, I have never seen that done, Your Honor. Again, I share my brother's concern, but mostly I

share my concerns regarding the impression that might leave in the eyes of the Jury.

THE COURT: Well, certainly the public has a right of free access to the Courtroom. There's no question about that. That right is not unfettered as counsel know. There are circumstances when the Courtroom may even be closed to the public, although those are very rare circumstances.

But as a matter of course, it's an unfortunate fact of life now that we do have metal detectors that people have to pass through when they come into the building. People cannot come in with weapons. And it seems to me that in a case such as this, there is a sufficient basis for the marshals to take identification from people when they come in. We don't need to have a hearing on that because I think we've already had some hearings previously in this case with regard to other measures that have been taken. I don't believe that requiring identification in any way restricts anybody's right to come into the Courtroom. It's a simple matter of identification and that does not bar anybody from coming into the Courtroom.

As far as the one point that I do think is a legitimate point, is there should not be any checking of individuals in the presence of the Jury and I would instruct the marshals to be sure that individuals are not questioned as to their identity within the eyesight or earshot of the Jurors. I don't believe that's happening now. I don't see how it could

be happening since we've taken great pains to keep the Jury in the jury room where they're not going to hear or see anything involved in this case. But I would add that caution to the marshals that any checking of identifications should be done in a manner that is not visible or audible to the Jurors themselves.

Now, Mr. Egbert, you wanted to be heard on Exhibit A, the admissibility of the Suddes report of March 3rd?

MR. EGBERT: Yes, Your Honor. believe it is an inconsistent statement of the witness. It's a statement authored by the witness and Duxbu was not told to make phone calls. He was simply told to receive any phone calls and the report is exactly the opposite of what he testifies to.

THE COURT: Is that the report in your hand?

MR. EGBERT: Yes, it is.

THE COURT: Would you hand it to the Clerk, please.

(COURT PERUSING DOCUMENT)

THE COURT: Okay. All right. Did you finish, Mr. Egbert?

MR. EGBERT: I don't need to reference. You have read it now, reread it but I think it is inconsistent to what he testified to**********

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

**********	CRIMINAL ACTION
UNITED STATES OF AMERICA	*NO. 95-0029T
Plaintiff	*
vs.	*MONDAY,
GERARD OUIMETTE (1) and	*JUNE 16, 1997
ROBERT DeLUCA, SR. (4)	*
Defendants	*
**********	Providence, RI

HEARD BEFORE THE HONORABLE
ERNEST C. TORRES
DISTRICT JUDGE
(EVIDENTIARY HEARING)

A-P-P-E-A-R-A-N-C-E:

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and
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Anthony M. Cardinale, Esquire
and
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MONDAY. JUNE 16, 1997
EVIDENTIARY HEARING

*********Clerk or both could get that message to him, I would appreciate it.

CARDINALE: Fine.

THE COURT: Mr. Cardinale, I

understand that Mr. DeLuca does not wish to be present for this hearing?

MR. CARDINALE: He has waived his presence, Your Honor.

THE COURT: It might be helpful if I briefly state the reason we are here.

This hearing is being conducted pursuant to a limited remand order from the Court of Appeals seeking the bases for this Court's denial of the Defendants' motion to direct the marshals to stop asking persons entering the Courtroom for identification.

I have filed and provided to counsel last week copies of my statement of facts, findings and reasons upon which that denial was based. And although the Court of Appeals did not require that an evidentiary hearing be conducted, I determined that after conferring with counsel, that the parties should be afforded an opportunity to develop additional facts that may be helpful to the Court of Appeals in determining identification procedure employed deprived the Defendants of their right to a public trial. And that's the purpose for which this hearing was scheduled.

It appears from the conference that was conducted with counsel, that the principal issues to be addressed are whether individuals who declined to provide identification were turned away and prevented from attending the trial and whether other individuals were deterred from attending because of the concern that they would be required

to provide identification.

Last Friday, I read the transcript of the argument before the Court of Appeals which, Mr. Cardinale, you were kind enough to supply, and it appeared from reading that, that there was some uncertainty as to whether the Court devised and ordered the identification procedure or whether that initiative came from the marshals.

Since I have stated in my findings that, in my judgment, the procedure was warranted under the circumstances, and I stated why that was my judgment, why, in my opinion, it was warranted, I am not sure why the answer to that question is important, but in the event that counsel or the Court of Appeals deem it significant, I think I can probably expedite matters here somewhat this morning by stating the record that; first of all, the Court did not devise or order the procedure. I do not recall whether or not I approved it in advance. I have no specific memory of doing so. But I can't say that I did not, and I can also say that one reason for any uncertainty is that I have approved that procedure in advance in the past on, at least, one occasion that I can think of where there was a high security trial involved

So I hope that is helpful expediting matters this morning.

MR. MITCHELL: Your Honor, in the event that there was a procedure or an application to the Court for the Court to approve it, would there be a record of that?

THE COURT: I don't believe so, Mr.

Mitchell.

MR. MITCHELL: Would Your Honor have reviewed any documents in connection with that?

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MR. EGBERT: I believe I heard that as part of the relevance and justification evidence?

THE COURT: Absolutely.

MR. EGBERT: In that case, Your Honor, based on the ruling, I would call as a witness, John Leyden, please.

JOHN LEYDEN, DEFENDANT'S WITNESS SWORN

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: John J. Leyden, L-E-Y-D-E-N.

DIRECT EXAMINATION

BY MR. EGBERT:

Q Good morning, sir.

A Good morning.

Q What is your current title?

A United States Marshal for the District of Rhode Island.

Q And can you tell us what was your position at the time of the beginning of the trial of United States versus Robert Deluca and Gerard Quimette?

A I was, in fact, the United States Marshal for the District of Rhode Island.

Q And prior to the beginning of that case, did you have occasion to meet with the Court, Judge Torres, at any time in regard to that case?

A Yes, I did.

Q And when was that?

A Prior to the trial.

Q Can you give me a date or an amount of time prior to the beginning of the trial?

A Probably a week or two or ten days before the trial went down.

Q And can you tell us where that meeting took place?

A I beg your pardon?

Q Can you tell us where that meeting took place?

A In the Judge's chambers.

Q And how did you arrive at that meeting, was it prearranged?

A Prearranged. I called for an appointment with the Judge with my deputy who I put in charge of the detail and we met with he Judge.

Q And who was the deputy who was in charge?

A U.S. Marshal Deputy Rachael St. Clair Moore.

Q And was Ms. Moore present with you during any

meetings you had with Judge Torres?

A Yes, sir, she was.

Q Prior to your arrival at that meeting with Judge Torres, did you submit any writings to the Court with regard to this matter?

MR. MADDEN: Objection.

THE COURT: Overruled. What's the objection, Mr. Madden?

MR. MADDEN: The information or the writings that the marshal may have submitted to the Court I would say are not material to the issues here.

THE COURT: Overruled. You may answer.

A No, sir, we did not.

Q And so no documents were provided by you or your deputies to your knowledge to the Court in that regard?

A No, sir, we did not.

MR. EGBERT: May I have a moment, please, Your Honor?

THE COURT: Yes.

(PAUSE)

Q At the meeting, did you say that occurred in the Judge's chambers?

A Yes, sir.

Q Was anyone present besides Judge Torres and yourself and the Deputy United States Marshal Moore?

A No, sir.

Q Was there a Court Reporter present?

A No, sir.

Q Was there a Clerk of the Court present?

A No, sir.

Q Was there anyone, to your knowledge, making any kind of record of what occurred between you and the Court?

A No, sir.

Q Did you take notes?

A No, sir.

Q Did Ms. Moore take notes to your knowledge?

A No, sir.

Q Do you know if the Court took notes?

A Not to my knowledge.

Q At that prearranged meeting, was there any discussion with you as to whether or not counsel should be notified in the case?

A No, sir.

Q And prior to your meeting with Judge Torres did you have any conversation with any of the United States Attorneys involved in this case concerning the matters you were going to discuss with Judge Torres?

A No, sir.

Q When you met with Judge Torres, could you tell us, please, what the conversation was?

A The purpose of the meeting was to set up security for the Courtroom for the upcoming trial. And we set up certain ground rules which we would abide by --

Q Before you tell us what you set up, can you tell us what the conversation you had with the Court was?

A The conversation, as I recollect, was strictly for security that we were going implement at the upcoming trial.

Q Marshal, I am you told us now what it concerned.

Can you tell me, please, what you said to the Court as best you can remember.

A Yes. I told the Judge that I was going to have a detail of deputies coming in from around the country to supplement my deputies in-house. I also stated, as did Deputy St. Clair, that we would have -- we would be screening the witnesses as they come into the Courtroom.

Q Screening the witnesses?

A I beg your pardon. The spectators.

Q And you told the Court you would be screening the spectators?

A We would be asking them for identification.

Q You said screening, was that correct?

A No.

Q Screening is what you told the Court?

A Yes, sir.

Q And what would you be screening them for, what did you tell the Court you would be screening them for?

A For identification, we'd ask their ID of a license so that they could prove who they were, and that they were going into the Courtroom.

Q And so that was a precondition to entry to the

Courtroom, I take it?

A Yes, sir, it was.

Q So that the purpose -- when you told the Judge that you were to engage in this procedure, did you tell him about any other measures that you were taking? yes or no.

A No. No, sir.

Q And so the conversation was solely concerning this screening process?

A And security-within the Courtroom which is part of the screening.

Q What other security measures did you tell the Court about with regard to the Courtroom?

MR. MADDEN: Objection.

THE COURT: What's the objection, Mr. Madden?

MR. MADDEN: Relevance. The purpose of the hearing is with regard to spectators. If there are other security matters involved, it really doesn't have any relevance with regarding to the spectators.

THE COURT: Well, again, Mr. Egbert, what are interested in knowing here is what the marshal may have said about security concerns involving the trial.

MR. EGBERT: Security measures, Your Honor. I want to know what other security -- he indicated that there was this relevant to this record. That is my proffer, so to speak.

THE COURT: Well as say, I'll permit you to

inquire into the security measures dealing with spectators or facts upon which the marshal judged that there was a need for such measures. But you're free to inquire or not inquire as you see fit. But that's the scope of the questioning that I will allow.

MR. MITCHELL: Your Honor, I am sorry to interrupt. But it's a housekeeping measure. Is it all right with the Court if we have an agreement that arguments advanced by counsel for Mr. Ouimette or objections made by counsel for either side will be deemed as made by both lawyers?

THE COURT: Do you have any objection to that, Mr. Madden?

MR. MADDEN: No objection, Your Honor.

MR. MITCHELL: Thank you, sir.

BY MR. EGBERT:

Q Marshal, let's go back to the general setting of this Courthouse for a moment before we go further on that conversation so you know what****

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*******rear entrance of the Courtroom and the cell block.

Q You said Courtroom, did you mean Courtroom or Courthouse?

A Courthouse, I'm sorry.

Q So you as marshal -- the marshals now has a separate camera to monitor what goes on from the back of the Courthouse?

A Yes sir.

Q Is that the same camera which is used for the monitor at the CSO's desk?

A The camera only monitors inside of our office which is the lockup and that's all.

Q So from the marshal's office, you can't observe what goes on outside in the back?

A No, sir.

Q So your only monitor at the marshal's office is of the cell block?

A Yes, sir.

Q Period?

A Period.

Q I would like to get back, if I could, to the conversation you had with Judge Torres which we were talking about, and you indicated that during that conversation you told Judge Torres that you wished to screen persons who came into the Courtroom, correct?

A Yes, sir.

Q And you said you wanted -- you said you were going to require that they give identification and produce identification as a precondition to entry to the Courtroom, is that correct?

A Yes, sir.

Q And did Judge Torres respond to you?

A He did not object.

Q What did he say?

A He didn't say anything.

Q He didn't say a word?

A No, sir.

Q And did you tell Judge Torres about other security measures you were implementing for purposes of dealing with people coming into the Courthouse?

A Yes, sir, I did.

Q What did you tell him?

A Based on confidentiality probably about Jurors, et cetera. But that was about the extent of it.

Q I am not sure I understand that.

A How we were going to handle the Jurors.

Q How you were going to handle Jurors?

A Yes, once they were selected and empaneled.

Q Do you have any record of the date of this meeting with Judge Torres?

A No, sir, I do not.

Q Did you make any report or memorandum concerning this meeting?

A No, I did not.

Q And I take it, then, there's absolutely no documentation of this meeting that you know of?

A No, sir.

Q What discussions were had concerning Jurors?

MR. MADDEN: Objection.

THE COURT: What's the objection?

MR. MADDEN: Beyond the scope of this

hearing. What discussions the marshal may have had with respect to moving Jurors or handling Jurors and so forth.

THE COURT: How is that relevant to this procedure, Mr. Egbert?

MR. EGBERT: I think it goes to the overall security which the marshal is suggesting to the Court. Quite frankly, I think some of it goes to the credibility of what the witness has testified to in the past. I mean, this is -- I mean, he has testified, respectfully, Your Honor, that he has this conversation with the Court concerning security where the Court remains mute, and I suggest that the rest of the conversation might be indicative of his memory of that particular statement. It seems to me to go beyond to think that the marshal service appears in the Court's chambers and has this conversation and the Court who is the responsible party, obviously, for your own Courtroom in that regard, remains mute. And I would like to press his memory as to the full extent of the conversation.

THE COURT: I will sustain the objection.

Q Did you tell Judge Torres that you would maintain a list of the persons who come into the Courtroom?

A No, sir.

Q And so that was never discussed at all?

A No, sir.

Q Did you tell -- was there any discussion with Judge Torres as to how this would come about, in other words, the physical layout of what you were going to do?

A Not that I can recall. No, not that I can recall.

Q It is not your practice to set up shop outside a Judge's Courtroom without telling them is that right?

A That's correct.

Q And you can't recall whether or not there was any discussion of how you were going to implement this procedure?

A I don't recall whether I mentioned that we were going to have a table with a deputy assigned to it or not.

Q Let's go to the procedure for a moment. Are you the responsible party for setting up the procedure?

A Yes, I am, along with my senior deputy.

Q I don't want to take advantage of any lack of knowledge. You were the person who was apprised of and apart of setting up the procedure?

A I was apprised of the policy and the procedure that was going to be used, yes, sir.

Q And you endorsed it and, in fact, ordered it, I take it, as the United States Marshal?

A I endorsed it.

Q Did you order it?

A Didn't have to order it. It was mention to me and sounded good to me along with my Chief Deputy and the Supervising Deputy who approved of it.

Q Who mentioned lit to you?

A My senior -- my deputy who was in charge of the trial.

Q And that was Ms. Moore?

A Rachael St. Clair Moore.

Q A procedure was then embarked upon where a marshal's station was set up just outside the spectator entrance to the Courtroom of Judge Torres, is that right?

A Yes, sir.

Q And that was done by setting I up a small desk, correct?

A Yes, sir.

Q And having stationed at that desk at all times at least one United States, Deputy United States Marshal?

A Yes.

Q And there were times there would be more than one, is that correct?

A There were times, yes, sir.

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Q Screen spectators, do you do that everyday?

A No, sir.

Q Is it required by the manual?

A It is right in that manual.

Q Well, this is your manual, right?

A United States Marshal, yes, sir.

Q It says it is required, right?

A In certain cases. We don't do it in all cases.

Q Do you see anything in there about in certain cases?

A It is our discretion.

Q So required means in your discretion?

A Yes, sir.

Q That's your --

MR. EGBERT: Just one second. I wanted to see this.

MS. RAPPORT: Yes.

MR. EGBERT: See it for one minute.

Q Now, the person at the desk outside of the door that is taking names and seeking identification, that person is required to address each person as the enter the Courtroom, is that correct?

A Yes, sir.

Q That person is required to ask each person that enters the Courtroom for their name?

A Yes, sir.

Q And to provide identification?

A Yes, sir.

Q And the identification must be one which is picture or satisfactory through some standard, I take it, to prove identification?

A Yes, sir.

Q What is that standard?

A A license with their picture on it and whatever has a picture and true identity.

Q And that's a requirement?

A Yes, sir.

Q Without it they don't come in?

A That's correct.

Q And that's the rule?

A Yes, sir.

Q And it, also, that person is also instructed to record identifying data-for each spectator or person entering the Courtroom, is that correct?

A Yes, sir.

Q And the identifying data which that person is instructed to record is the name, correct?

A Yes, sir.

Q The date of birth?

A Yes, sir.

Q The license number if that's what was used, for example?

A I am not sure if the license number is down, but that's a possibility.

Q They're, basically, required to not only identify the person, but record the identity of the identification. In other words, was it a Rhode Island license and what was its number.

Was it a Mass. license, what was its number. That's true, isn't it?

A Yes, sir.

Q If the person had some other kind of ID with a picture on it, they would identify what that was, is that correct?

A Yes, sir.

Q And there were no exceptions to this rule, were there?

A No, sir.

Q Was the marshal at the door permitted to exercise discretion, and what I mean by that is the following, you have just told us of a rule?

A Yes, sir.

Q And that rule is, show identification , picture, license and the like, or you don't come in.

Was the marshal allowed to make up in his own mind whether or not he or she would let someone in because they looked trustworthy for example?

A It is a possibility. There was discretion.

Q So the marshal then at door would exercise that discretion, well, this person looks nice, and I don't think I will keep them out, correct?

A Probably not. They probably would know from somebody else who that person is, person or persons.

Q So in other words if the marshal, for example, if one of the United States Marshal --

THE COURT: One moment, Mr. Egbert. Ms. Rapport?

MS. RAPPORT: I just needed to talk to Mr. Marshall, I mean to Mr. Mitchell.

THE COURT: Why don't you wait until Mr. Egbert finishes his questioning. Or if you'd like to sit next to Mr. Mitchell so you can talk to him, you can do that.

MS. RAPPORT: Sorry.

THE COURT: I am sorry, do you want that

last question read back, Mr. Egbert?

MR. EGBERT: If I may.

THE COURT: Read the last question back, please.

(REPORTER READS BACK QUESTION)

Q So according to the United States Marshals --

MR. EGBERT: Strike that. Let's try that one over.

Q If someone came to the door without the identification and a marshal, for example, would have said to a U.S. Attorney, do you know this person and the U.S. Attorney said, oh, yes, that's Assistant Attorney General over in the state, would that be okay?

A Yes, sir.

Q So that person could come in?

A Yes, sir.

Q And could the marshal rely on the Defendant's family, for example, if someone came to the door and had no identification and one of the Defendant's family said, oh, I know that person. They work for some law firm down in North Carolina, would they be allowed to come in?

A Depends on the deputy being familiar with the Defendant's families as to their identification. But it is a possibility.

Q So that would be okay?

A Yes.

Q In your mind?

A Yes, sir.

Q So in other words., people who show up without identification so long as they were identified by someone else who the marshal could have decided to trust or not, they could get in?

A Depends on the situation. I believe, if I may the Defendant's mother was here I think, one of the sisters -- on one occasion probably vouched for her in the beginning.

Q Were you here for that event?

A I was here initially, but I observed the people coming into the Courtroom on a daily basis.

Q Were you here for that event you just described or was somebody reporting this to you?

A I wasn't here, but I heard probably from one of my deputies. I'm not positive of that, but it seems to ring a bell.

MR. EGBERT: I move to strike that answer as to what he might have heard from somebody.

THE COURT: The answer may be stricken.

Q Well, so the marshal, the deputy marshals were given discretion then to make those judgments?

A At certain times, but most of the times --

Q But as a ruling, now?

A As a rule.

Q You set the rules?

A That's correct.

Q And ask people were briefed?

A Yes, sir.

Q And do you know what they were briefed as to the exercise of their discretion?

A Their license or identification.

Q Period?

A Period.

Q And that's the rule.

A That's the rule.

Q And did you tell them to keep a list?

A That list was by -- the deputy in charge was the one who suggested that.

Q Deputy Moore?

A Deputy Moore.

Q So Deputy Moore suggested keeping a list to you? A I don't remember if she did or not. If she ran it by me, then I didn't object to it.

Q You have no memory of how this issue of keeping a list came to be?

A Well, when they were asking for identification, they said they would be keeping a list.

Q Marshal, I am sorry. When you say they said they'd be keeping a list?

A I beg your pardon. The deputy, Rachael Moore.

Q She told you they were keeping a list?

A Yes, sir.

Q And you approved it?

A Yes, sir.

Q Did you discuss it with her?

A I approved it. That was it.

Q That was it?

A That's right.

MR. EGBERT: May I have a moment, please, Judge?

THE COURT: Yes.

(PAUSE)

Q So she told you she was going to keep a list and you said fine?

A Yes, air.

Q Did you ask her what she was going to do with the list?

A Keep it for the records.

Q What records?

A In her file.

Q In her file?

A Yes. In the marshal's office.

Q For what?

A For our purposes.

Q What were your purposes?

A To know who was in the Courtroom on a daily basis.

Q Well, once the day was over -- I take it, you say that this showing of identification was for security purposes, right?

A Yes, air.

Q And what was the security purpose it enhanced?

A To insure the spectators coming into the Courtroom as

to who they were and their identification.

Q What security purpose did that enhance?

A It enhanced the whole security of the Courthouse and the trial.

Q In what way?

A My virtue of knowing who the people were in the Courtroom.

Q What did knowing their names have to do with anything?

A It has a lot to do.

Q Tell me.

A Just as from a law enforcement perspective. We know some of the people, and we know over the years. So we want to make sure that we knew who the people were in the Courtroom.

Q You know some of the people and you know over the years, what do you know?

A Forty-two years in law enforcement.

Q Right.

A I know a lot of people. Good people and whatever.

Q Good people and bad people, you can say it?

A That's right

Q You make that judgment?

A I didn't make that judgment.

Q This is your judgment of good and bad people. Good and evil so to speak.

A You asked me the question.

Q And so when you get the names. you make the judgment whether these people were good or evil, right?

A My deputies could and I could, too.

Q So you can make a judgment whether they were good people coming to Court or evil people were coming to Court?

MR. MADDEN: Objection.

THE COURT: Overruled.

Q Right?

A We did not object to anybody coming, everybody was admitted into the Courtroom.

Q And so, so the taking of the names and getting the identification was to do what?

A Purposes of intelligence.

Q And that's, in fact, exactly what you told the Providence Journal when they asked, isn't that right?

A No, sir.

Q Intelligence is a law enforcement term for clandestine seeking of information, is that correct

A Yes, sir.

Q And that's what this was for, correct?

A No, sir.

Q You just said it was, didn't you?

A I did not.

Q The dates of birth that were taken from these people, those were taken in order that you could run their criminal histories, isn't that true?

A Yes, sir.

Q You did run their criminal histories, didn't you?

A I don't know if we ran all of them or not.

Q So people who came to this Courtroom were subject who wanted to watch this trial were subject -- who wanted to watch this trial were subject to having you run their criminal histories?

A Yes, sir.

Q At your discretion?

A The deputy's discretion.

Q Discretion of some deputy?

A Yes.

Q And what happened to those criminal histories that were run?

A Probably destroyed. I don't have them.

Q Do you know.

A I don't know.

Q Are they in a file somewhere?

A Not to my knowledge.

Q Have you looked?

A No, I have not.

Q Do you have a computer record of which histories you sought?

A I do not.

Q Does the marshals?

A I do not know that.

Q Have you checked?

A I have not.

Q Who ran the criminal histories?

A If they were run, they were run by the deputy U.S. Marshals themselves or the criminal Clerk assigned to the U.S. Marshal's office.

Q Is there a record kept of all criminal histories sought by your office in a legitimate fashion?

A No, sir.

Q There is no records at all?

A No, sir.

Q Once the day was done, okay, once the day was over and the Courtroom went fine and nothing happened of any interest, the list was not destroyed, was it?

A No, sir.

Q It was maintained?

A Yes, sir.

Q And it was circulated to other Government agencies, wasn't it?

A No, sir.

Q Was it not circulated to the FBI?

A No, sir.

Q It is your statement under oath, Marshal, that no list or copies of this list or information from this list was in any way communicated to any other law enforcement agency, is that your testimony?

A That's my testimony. You know that to be true?

A Yes, sir.

Q Because you kept the list?

A I did not, personally. But my deputy did.

Q And who is that?

A Rachael St. Clair Moore.

Q And where was the list kept after the trial?

A I believe it was kept in the deputy's desk, but I am not positive of that.

Q And recently there was an order of this Court to produce any lists that were made, is that correct?

A Yes, sir.

Q Did you make that production?

A No, I did not.

Q Who did?

A My supervising deputy U.S. Marshal Dennis A'mico.

Q And do you know where Mr. A'mico obtained the list?

A I don't know the exact date, sir.

Q Do you know where he got it from?

A I would say that he must have gotten from deputy, U.S. Deputy Marshal Rachael St. Clair Moore.

Q Are you speculating on that or do you have knowledge of that?

A I am speculating.

Q Where is the original of that list now?

A I beg your pardon?

Q Where is the original of the list now?

A Where's the original?

Q Yes.

A I would believe that it's in the possession of Deputy

U.S. Marshal Rachael St. Clair Moore.

MR. EGBERT: Your Honor, I'd ask that be produced.

THE COURT: Do you have it with you, Marshal or does Mr. Madden? You have it there, Mr. Madden?

First let's verify from Marshal Leyden that that's the list.

(PAUSE)

THE COURT: Do you know, Marshal, whether that is the original lists or is that something we have to ask Marshal Moore?

THE WITNESS: That appears to be the original list.

THE COURT: Do you know that or is that something that only Marshal Moore can answer?

THE WITNESS: Marshal Moore would have to answer that.

THE COURT: Is there any dispute about this, Mr. Madden? I don't want to bring in a witness unnecessarily if there is no ---

MR. MADDEN: That's the list I received, Your Honor, from Deputy Moore this morning at, approximately, nine-fifteen or nine-twenty.

MR. EGBERT: May I see it?

(PAUSE)

MR. EGBERT: Judge, I'm afraid I can't

stipulate. It is clear to me, unfortunately, I think it is clear to me, at least, some of these pages are Xerox copies and so I am reluctant. I have to inquire, but I ask that it be marked for identification in any event.

THE COURT: That may be marked as Defendant's Exhibit B for identification.

(WHEREUPON, DEFENDANT'S EXHIBIT DESIGNATION B IS MARKED FOR IDENTIFICATION)

Q When you met with Judge Torres, did you tell Judge Torres that you would be running record checks of the people who might come into Court on this list?

A No, sir.

Q Did you seek his authorization or approval in any way for that practice?

A No, sir.

Q Did you tell Judge Torres that you sought this for intelligence?

A No, sir.

Q Were the record checks run contemporaneous with entry, and if that question is vague, I'll rephrase it. Do you understand the question?

A Rephrase it, please.

Q Let's take an example. Mr. A comes to the door, and the marshal says name and identification and takes it down. Is the record check done before that person gains entry to the Courtroom?

A No, sir.

Q Is it even done that day?

A No, sir.

Q Did you have -- was there another procedure engaged in by your office with regard to security in this Courtroom by way of a reshaping or rearrangement of the seating?

MR. MADDEN: Objection.

THE COURT: What's the objection?

MR. MADDEN: Again, relevance. The admission of spectators. The rearrangement of seating.

THE COURT: You're talking about seating of spectators?

MR. EGBERT: Yes.

THE COURT: Overruled. You may answer.

A Yes, there was.

Q What was done in that regard?

A The deputy in charge would -- was the person who arranged as to where the press would probably be sitting, and that's, but other than that, everybody sat down where there was a seat available.

Q Was there not a section of the spectators' section that was closed off to the public?

A I am trying to refresh my memory. I believe there was a section that was closed off. But I am not positive.

Q Let me try to refresh your memory, if I may. Do you see Mr. Libby seated over there?

A Yes.

Q Was there a yellow tape going from front to the back about where Mr. Libby is?

A I believe so. I am not positive.

Q What was the purpose of that?

MR. EGBERT: Strike that.

Q Who authorized that?

A The deputy in charge of the detail. It wasn't authorized. We have the security in the Courtroom.

Q Was the Court informed of that procedure?

A Not to my knowledge.

Q And so that section of the seating was simply closed to the public, is that right?

A To the best of my recollection, yes.

Q And for the record, if I may ---

MR. EGBERT: May I move over to here, Your Honor, if I may?

THE COURT: Yes.

Q For the record, it's about where Mr. Libby is which is one, two, three, four rows, correct?

A There are four spectator rows, correct?

A Yes, sir.

Q And what we are talking about is maybe three or four seats per row which were cordoned off with yellow tape, correct?

A To the best of my recollection, yes.

Q And the public was denied access to those rows?

A Yes, sir.

Q And no additional seating was added to the room in any way, was it?

A No, sir.

Q So it was just as I have described it?

A Yes, sir.

Q And what was the reason for that?

A I can't answer that.

Q Well, did you discuss the reason for it with Deputy Marshal Moore?

A I did not.

Q And it was her decision to do it, I think you said?

A Yes, sir.

Q Without your input at all?

A Not to my knowledge. I beg your pardon. It would have been run by me, and I probably approved it.

Q But you wouldn't have asked why you want to do it, why she wanted to do it?

A No.

Q Did you tell her to get the approval of the Court?

A I did not.

Q Did you have any understanding that she out approval of the Court?

A Not to my knowledge.

Q Have you discussed that with her recently?

A I have not.

MR. EGBERT: Excuse me one second.

Q Now, once again, are you familiar with the fact that

there was an occasion where people were permitted to sit in the area which you previously been described as an area to keep vacant that we have just been talking about, and so that you are understanding what I'm talking about, do you recall an incident involving some citizens from the Soviet Union?

A Now that you mention it, you have refreshed my memory.

Q And even though this ---

MR. EGBERT: Strike that.

Q The area you described with Mr. Libby on back and facing back which is to the left which we have described as being kept unavailable for seating, that was opened up for seating for some citizens of the Soviet Union who came to observe this case, is that right?

A Yes, sir.

Q And was their identity taken?

A I am not sure.

Q Have you reviewed the lists?

A Have I reviewed -- I just looked at it.

Q Do you see any Soviet citizens in block listed on those lists?

A I did not, but I didn't look at it closely either.

Q Did you see any dates of birth for those Soviet citizens?

A I said that I didn't notice on there.

Q Did you do any background checks of those Soviet citizens?

A No, sir.

Q And there's no permanent record of who those Soviet citizens were?

A Not to my knowledge.

Q Who made the decision to permit those Soviet citizens to sit in an area where United States citizens were not permitted?

A Deputy in charge of the detail.

MR. EGBERT: May I have one minute, Your Honor. I am about done.

(PAUSE)

Q Marshal, you have the capacity, do you not, to place second magnetometers -- second is the wrong word.

MR. EGBERT: Strike that.

Q You have the capacity to place additional magnetometers any place you wish in this Courthouse if you desire, isn't that right.

A Yes, sir.

Q And you could, if you wished, to place one right outside this Courtroom door?

A Yes, sir.

Q There's no impediment to that from the structure of this building?

A That's correct.

Q And it has been done in the past?

A Yes, sir.

Q In fact, its been done in other cases in the past that a

magnetometer would be placed just outside the Courtroom door as a second pass through for the spectators coming into a particular Courtroom?

A Yes, sir.

Q That was not done in this case?

A No, sir.

Q And you also had no impediment to placing security cameras in the hallway outside of this Courtroom, correct?

A No, sir.

Q You could have done that if you wished?

A Yes, sir.

Q And that would have made a permanent record of anyone who came and left the Courtroom, correct?

A Yes, sir.

Q And everybody, all citizens coming to this Courthouse pass through the security check point on the first floor, post one, don't they?

A Yes, sir.

Q And you do not require those persons to identify themselves, do you?

A No, sir.

Q And there is no list of persons coming into that section of the Courthouse?

A No, sir.

Q Correct?

A No, sir.

Q And so, for example ---

MR. EGBERT: Well, strike that. I have nothing further at this time.

THE COURT: I feel compelled to add one thing, Mr. Egbert. I will give you a chance to question on this if you wish. But in the interests of expediting matters and not going on wild goose chases, I will tell you that it is my practice in criminal trials not to permit individuals to sit in those three or four seats*****

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MR. CARDOMALE: Call David DiFilippo.

DAVID DiFILIPPO, DEFENDANT'S WITNESS SWORN

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: David P. DiFilippo

DIRECT EXAMINATION

BY MR. CARDINALE:

Q Mr. DiFilippo, in a voice loud enough for everybody in this Courtroom to hear, would you tell the Court, sir, where do you live?

A At 46 Birchwood Drive, North Providence, Rhode Island.

Q And are you employed?

A Yes, I am.

Q How are you emplyed?

A I'm the editor of Italia U.S.A. Newspaper.

Q And where is that located?

A Johnson, Rhode Island.

Q And directing your attentoin to the time period of October of 1995, did there come a time when you came to this Courthouse for the purposes of observing a trial?

A Yes. At that time I had come to the Courthouse to try to do a story on Robert DeLuca's attorney which was you, and I was refused admittance that day.

Q And can you tell us what happened?

A I went to one of the marshals outside, alnd presented my working press ID, and I was told it was insufficient.

Q And what then happened?

A Well, he said, well, that is my business card and he said well, that's just an Italian paper anyway.

Q And what happened after that?

A He also accused me or asked if I was related to Mr. DeLuca.

Q Did you answer him?

A I told him, I said, well, I'm Di, he's De in a nonoffending way. I just wanted to let him know that not all Italians were related, number one. That I was here on a day-by-day basis, and I was still refused admittance.

Q And did you come back on any other occasion?

A No, actually that day I did. I just went as a normal citizen. I presented my ID. I tried to walk in, and then he asked do you have a regular ID. I said I just showed you my

photo, he said, no I need a driver's License which I did provide at that time.

Q Were you given any indicattion of what would have occurred if you didn't show him you identificatoin like a driver's license as far as getting in?

A He told me point blank that I wasn't getting in. That ID wasn't sufficient enough

Q And the only way you would get in is by showing another ID?

A I assume that because when I gave my driver's license I was allowed to come in. So ---

Q Were you allowed to sit in the press area?

A No, I was not.

MR. CARDINALE: No other questions.

APPENDIX C

EVIDENCE

PROVIDENCE JOURNAL-BULLETIN
(SATURDAY, OCTOBER 14, 1995)

Witness tells of beating as trial opens for mobsters

- David J. Duxbury testifies in the federal extortion trial that he was severely beaten then told he had to come up with $5000 in 24 hours.

By W. ZACHARY MALINOWSKI
Journal-Bulletin Staff Writer

PROVIDENCE--David J. Duxbury gave a chilling account yesterday of what happens to someone who crosses the mob.

Duxbury, the first witness called in the federal extortion trial of mobsters Gerard T. Ouimette and Robert P. DeLuca Sr., calmly recounted how he was summoned to a downtown strip club and savagely beaten last winter.

His assailants--numbering four--also demanded $5000 from him within 24 hours.

"The larger of the gentlemen put on a pair of black gloves and started swinging at my face," said Duxbury, 54, a beefy red-headed man. "He hit me several times in the head. That was the basic concentration point."

Responding to questions posed by Assistant U.S. Attorney Kenneth P. Madden, Duxbury, owner of Dix Auto Sales & Service in Providence, said that he bled profusely.

Finally, he testified, Ouimette stepped in, grabbed him

by the throat and asked him whether he knew him. Duxbury wasn't sure.

"My name is Gerard Ouimette," Duxbury recalled the man saying.

Duxbury said Ouimette, described by authorities as a mob enforcer, slapped him in the face and demanded that he cough up the money by the next night.

Ouimette allegedly claimed that Duxbury had to pay for trying to extort money from The Satin Doll strip club where they were at the time.

Before leaving, Duxbury said, Ouimette pulled a cloth from a nearby table and handed it to him to wipe off his bloody face.

Duxbury immediately contacted the authorities.

In pointed cross-examination, Ouimette's lawyer, Richard M. Egbert, of Boston, repeatedly tried to trip up Duxbury, saying his testimony differed from what he told the FBI and a grand jury last winter.

Egbert also suggested that Duxbury drinks too much and may suffer from memory loss.

The government contends that the four men who administered, or were party to the beating, were Ouimette, DeLuca's son, Robert P. DeLuca, Jr., Kenneth Raposa and James "Slugger" Gellerman.

Ouimette, 55, of Fall River Mass.; Gellerman, 34 of Johnston; Raposa 19, of Fall River; and the younger DeLuca, 27, of Lincoln are charged with extortion and conspiracy for

their involvement in the alleged extortion attempt against Duxbury.

Raposa and DeLuca's son will be tried separately next month.

On Wednesday, minutes before Jury selection began, the case took a stunning turn.

Gellerman, a career criminal with a long arrest record, pleaded guilty to three extortion-related charges and turned government informant. He is expected to testify against his former cohorts in the alleged extortion ring that operated from December 1994 to March 1995.

Ouimette, Gellerman and the elder DeLuca, 50, of Lincoln, also are charged with extortion for allegedly trying to shake down Paul A. Calenda a Cranston businessman for $125,000.

If convicted, the government plans on invoking the "three-strikes-and-you're out" provision of the federal anticrime law against Ouimette and the elder DeLuca, a ranking member of the Patriarca crime family, authorities say.

That means they could face life imprisonment without parole, only the third time anyone in the nation has been punished under the statute since it became law last year.

Security was tighter than usual in federal court yesterday. Marshals were posted outside the courtroom doorway, recording the names and driver's license numbers of the 31 spectators who entered.

"It's good intelligence," said a marshal.

A court clerk warned members of DeLuca's family that they cannot "blow kisses" or make gestures at the defendants.

In opening statements a federal prosecutor outlined the government's case.

Assistant U.S. Attorney James A. Leavey said the jury will view a secretly video-recorded meeting between Ouimette and Calenda. In it, he said, Ouimette boasts that he works for DeLuca, demands $125,000, and tells him about the Duxbury beating.

"[Ouimette] also proceeded to tell Mr. Calenda about his connections in New York. . . bosses in New York," Leavey said. "If he has a problem he can call New York."

The government alleges that the seeds of the alleged extortion ring were sown in April 1994, just days after Ronnie Coppola, a mob loanshark and bookmaker, was gunned down in a Cranston social club.

Leavey said the elder DeLuca tended Coppola's funeral at St. Rico's Church in Johnston and approached the mobster's widow, Paula Coppola.

DeLuca asked Coppola to call him if she found any "betting slips" detailing who owes what to the mob--in her Cranston town house Leavey said.

He pointed out that Copp worked for DeLuca, who in turn "worked for Boston," a reference to the base of the Patriarca crime family.

A few months later Leavey said, Paul Coppola was

baby-sitting a child who was playing with her husband's hair brush. Suddenly, a piece of paper fell from the brush with such code names as "Dux" and "Dino" and detailing about $35,000 in loan shark debts.

Paula Coopola called DeLuca, Leavey said the mobster insisted that the total was just a fraction of what people owed him.

"Ronnie and I had $300,00 on the streets." DeLuca said, according to Leavey.

In early 1995, Paula Coppola and Robert . . . began dating, eventually moving in together. Leavey said they both agreed to become government informants and . . . conversations with Ouimette.

They are in the federal Witness Protection Program; and they are expected to testify--possibly next week.